# DOCKET

# SUPREME COURT
OF THE UNITED STATES

No. 10-333
Title: Gary Swarthout, Warden, Petitioner
v.
Damon Cooke
Docketed: September 9, 2010
Linked with 10A765
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (06-15444)
Decision Date: June 4, 2010
Rule 12.4

| ---Date--- | --------Proceedings and Orders---------- |
|---|---|
| Sep 2 2010 | Petition for a writ of certiorari filed. (Response due October 12, 2010) |
| Sep 2 2010 | Appendix of Gary Swarthout, Warden filed. |
| Oct 7 2010 | Order extending time to file response to petition to and including November 12, 2010. |
| Nov 12 2010 | Brief of respondents Elijah Clay and Damon Cooke in opposition filed. |
| Nov 12 2010 | Motion for leave to proceed in forma pauperis filed by respondent Elijah Clay. |
| Nov 12 2010 | Motion for leave to proceed in forma pauperis filed by respondent Damon Cooke. |
| Nov 19 2010 | Reply of petitioner Gary Swarthout, Warden filed. (Distributed) |
| Nov 23 2010 | DISTRIBUTED for Conference of December 10, 2010. |
| Jan 3 2011 | DISTRIBUTED for Conference of January 7, 2011. |
| Jan 10 2011 | DISTRIBUTED for Conference of January 14, 2011. |
| Jan 18 2011 | DISTRIBUTED for Conference of January 21, 2011. |
| Jan 24 2011 | Petition GRANTED. Judgment REVERSED. Justice Ginsburg concurring. |
| Jan 24 2011 | Motion for leave to proceed in forma pauperis filed by respondent GRANTED. |
| Jan 24 2011 | Motion for leave to proceed in forma pauperis filed by respondent GRANTED. |
| Jan 31 2011 | Application (10A765) to extend the time to file a petition for rehearing from February 18, 2011 to March 10, 2011, submitted to Justice Kennedy. |
| Feb 4 2011 | Application (10A765) granted by Justice Kennedy extending the time to file until March 10, 2011. |

# PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED

10-333 SEP 2-2010

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No. 10-

# In the Supreme Court of the United States

GARY SWARTHOUT, *Petitioner,*

v.

DAMON COOKE, *Respondent.*

MATTHEW CATE, *Petitioner,*

v.

ELIJAH CLAY, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether a federal court may grant habeas corpus relief to a state prisoner based on its view that the state court erred in applying the state-law standard of evidentiary sufficiency governing state parole decisions.

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Gary Swarthout, the Warden at California State Prison, Solano, and Matthew Cate, the Secretary of the California Department of Corrections and Rehabilitation, respectfully petition for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in these cases.[1]

## OPINIONS AND JUDGMENTS BELOW

The opinion of the Ninth Circuit Court of Appeals, reversing the judgment of the district court and remanding with instructions to grant respondent Damon Cooke the writ of habeas corpus, is reported as *Cooke* v. *Solis*, 606 F.3d 1206 (9th Cir. 2010). The decision of the United States District Court for the Northern District of California, denying habeas corpus relief, is unreported. The rulings of the state superior court, the California Court of Appeal, and the California Supreme Court, all denying state habeas corpus relief and upholding the Board of Prison Terms'[2] denial of parole, are unreported.

The memorandum decision of the Ninth Circuit Court of Appeals, affirming the judgment of the district court granting respondent Elijah Clay the

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[1] Cooke is currently in Warden Swarthout's custody and Clay is currently in Secretary Cate's constructive custody; therefore, Swarthout and Cate, rather than the wardens who had custody during the pendency of the underlying proceedings, are named as the petitioners.

[2] The Board of Prison Terms was renamed in 2005 to the Board of Parole Hearings. Cal. Penal Code § 5075(a). Because the Board issued the underlying parole decision in this case before 2005, this petition refers to the Board as the Board of Prison Terms.

writ of habeas corpus, is unreported. The decision of the United States District Court for the Central District of California is also unreported. The rulings of the state superior court, the California Court of Appeal, and the California Supreme Court, all denying state habeas corpus relief and upholding the Governor's denial of parole, are unreported.

Each is reproduced in the Appendix. App. 1a, 26a, 42a-44a., 64a, 68a, 100a, 104a, 109a-110a.

## STATEMENT OF JURISDICTION

As to respondent Cooke, the judgment of the court of appeals was filed on June 4, 2010. App. 1a. The court issued its mandate simultaneously with the opinion; and, on July 19, 2010, the court denied the State's motion to recall the mandate and stay enforcement of relief. App. 46a-48a. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

As to respondent Clay, the judgment of the court of appeals was filed on June 18, 2010. App. 64a. The court issued its mandate on July 12, 2010. App. 111a. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

## RELEVANT STATUTORY PROVISIONS

Section 2254 of Title 28 of the United States Code provides in pertinent part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits

> in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

## STATEMENT

### Introduction

In *In re Rosenkrantz*, 29 Cal. 4th 616 (2002), and *In re Dannenberg*, 34 Cal. 4th 1061 (2005), the California Supreme Court held, as a matter of state law, that state courts may review, for "some evidence," decisions rendered by the Governor or the Board of Prison Terms denying parole to state prisoners sentenced to prison for life. Later, in *In re Lawrence*, 44 Cal. 4th 1181 (2008), and *In re Shaputis*, 44 Cal. 4th 1241 (2008), the California Supreme Court further explained, again under state law, that "the standard of review properly is characterized as whether 'some evidence' supports the conclusion that the inmate is unsuitable for parole because *he or she currently is dangerous*." 44 Cal. 4th at 1191 (emphasis added); see also 44 Cal. 4th at 1254. Next, in *Hayward* v. *Marshall*, 603 F.3d 546 (9th Cir. 2010) (en banc), the Ninth Circuit held that, in light of *Lawrence* and *Shaputis*, the federal habeas court may review, under 28 U.S.C. § 2254, "whether the California judicial decision approving

the [parole authority's] decision rejecting parole was an 'unreasonable application' of the California 'some evidence' requirement, or was 'based on an unreasonable determination of the facts in light of the evidence.'" *Hayward*, 603 F.3d at 563.

In the two cases involved in this consolidated petition, the Ninth Circuit found no sufficient evidence of current dangerousness under state law to support the denial of parole, and held that the state court decisions upholding the denial of parole to respondents Cooke and Clay were "unreasonable" under 28 U.S.C. § 2254(d). The court, therefore, granted them habeas corpus relief. The issue presented is whether 28 U.S.C. § 2254 permits the federal court to grant habeas corpus relief based on second-guessing the state court's application of the state-law standard of judicial review governing state parole decisions.

**Respondent Cooke's Case**

*1. State Parole Proceedings*

Respondent Damon Cooke was sentenced in a California court to an indeterminate term of seven years to life in prison with the possibility of parole following his 1991 conviction for attempted murder with the use of a firearm. In 2002, the California Board of Prison Terms concluded, based on state regulatory factors, that Cooke was not suitable for parole and that his release would pose an unreasonable risk of danger to society. Its decision was based on Cooke's commitment offense, his failure to fully participate in self-help and therapy programs, his failure to develop a marketable skill,

three incidents of misconduct in prison, and negative aspects of his most recent psychological report. App. 49a-60a.

*2. State Court Proceedings*

Cooke filed a petition for writ of habeas corpus in the state superior court. He argued that the Board's decision was arbitrary and capricious in violation of his state and federal due process rights because the facts of his commitment offense after so many years no longer amounted to even a modicum of evidence that he was a current threat to society. The court denied the petition, explaining that "the record submitted by [Cooke] does not support [Cooke's] claims that his Constitutional and statutory rights were violated by the [Board]. The record indicates that there was some evidence, including but certainly not limited to the life offense, to support the board's denial of [Cooke's] parole." App. 42a.

Cooke filed a petition for writ of habeas corpus in the California Court of Appeal. That court summarily denied the petition. Cooke then filed a petition for direct appellate review, also raising the same claims, in the California Supreme Court. That court denied review. App. 43a, 44a.

*3. Federal Habeas Corpus Proceedings*

a. Cooke next filed a federal petition for writ of habeas corpus under 28 U.S.C. § 2254, challenging the Board's denial of parole on the grounds that the state courts violated his constitutional rights in their application of the state "some-evidence" standard and alleging the Board violated his due process rights in

various other ways. The district court denied the petition, concluding that Cooke's due process rights were satisfied; he was provided an opportunity to be heard, was informed why he was unsuitable for parole, and some evidence supported the Board's decision. App. 26a-40a.

b. In a published opinion authored by Judge Reinhardt, a three-judge panel of the Ninth Circuit reversed. App. 1a-25a. Inquiring into the "nature and scope of the federally enforceable liberty interest created by California's 'some evidence' requirement," the panel held that "California's 'some evidence' requirement is a component of the liberty interest created by the parole system of that state." App. 18a. And, invoking the en banc *Hayward* opinion, the panel posed the question as "whether the decision of the Alameda County Superior Court was an unreasonable application of California's 'some evidence' requirement . . . ." App. 18a.

The panel, relying on an erroneous interpretation of state law, determined that the crime could not support the denial of parole. The panel then took it upon itself to independently "examine each of the Board's other stated reasons for denying parole." App. 20-21a. Further, although the Board had determined that Cooke's prison disciplinary history supported denial of parole, App. 49a-60a, the panel independently judged Cooke's violations to have been merely "minor and non-violent" remote occurrences. App. 21a. Similarly, the panel rejected, as a "bare assertion," the Board's finding that without further therapy and programming to cope with stress and to understand the factors leading to the crime, Cooke would continue to be "unpredictable" and a "threat to others." App. 22a. The panel also discounted the Board's determination that Cooke needed to learn a

trade; after recounting positive information about Cooke, the panel asserted that Cooke's certification in a trade would have no benefit and would not "render him non-dangerous." App. 23a. The panel therefore opined that "nothing in the record supports the state court's finding that there was 'some evidence' in addition to the circumstances of the commitment offense to support the Board's denial of [Cooke's] parole." App. 24a. Based on this reweighing of the evidence, the panel held that "the state court decision was 'based on an unreasonable determination of the facts in light of the evidence'. *Hayward*, 603 F.3d at 563 (quoting 28 U.S.C. § 2254(d)(2))." App 24a.

The panel remanded the matter to the district court with instructions to grant the writ. App. 24a. On June 24, 2010, the district court granted the writ and ordered the Board to hold a new hearing to reevaluate Cooke's suitability for parole in accordance with the Ninth Circuit's decision.[3] App. 61a.

**Respondent Clay's Case**

*1. State Parole Proceedings*

Respondent Elijah Clay was sentenced in California to a prison term of seven years to life with the possibility of parole based on a 1978 conviction for first-degree murder. In 2003, the Board of Prison

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[3] Although not in the record, the State can report that Cooke's court-ordered hearing was held on August 19, 2010, and parole was denied. The district court, however, is currently considering Cooke's motion to alter or amend the judgment to provide for his immediate release from custody.

Terms found Clay suitable for parole and reversed the Board's decision. The Governor, however, exercised his right to review the Board's decision and on April 30, 2003, he found Clay unsuitable for parole. App. 114a. The Governor cited the gravity of Clay's crime, Clay's failure to adequately participate in self-help programs to explore and address the causative factors for his participation in the commitment offense, his unrealistic parole plans, and his extensive criminal history – consisting of numerous robberies and a prior prison term. App. 112a.

*2. State Court Proceedings*

Clay filed a petition for writ of habeas corpus in the state superior court. He argued that he was denied due process because the Governor's decision was not supported by some evidence or any reliable information to support a reversal of the Board's parole grant. After recounting the evidence on which the Governor had relied, the court determined that the Governor's conclusions were supported by some evidence. App. 104a.

Clay filed a petition for writ of habeas corpus in the California Court of Appeal. That court summarily denied the petition. He then filed a petition for direct appellate review, also raising the same claims, in the California Supreme Court. That court denied review. App. 109a-110a.

*3. Federal Habeas Corpus Proceedings*

a. Clay next filed a federal petition for writ of habeas corpus alleging, among other things, that his due process rights were violated because the

Governor's decision was not supported by "some evidence." The district court specifically found that Clay received all the procedural protections required by *Greenholtz* v. *Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979). Nonetheless, the court granted the petition on the grounds that, because of the passage of time, continued reliance on Clay's commitment offense as a reason to deny parole violated due process, and the remaining factors the Governor relied on were "not supported by some evidence with an indicia of reliability." App. 68a, 100a.

The district court therefore concluded that "the state court's [denial of the petition] was based upon an unreasonable determination of the facts in light of the evidence presented during the parole hearing and amounted to an unreasonable application of clearly established Supreme Court precedent." App. 97a. The district court ordered the warden to set a parole release date in accordance with the Board of Prison Terms' prior determination finding petitioner suitable for parole, and release petitioner on parole if that date has passed, within thirty days. App. 98a-99a.

b. The State appealed and sought a stay of the district court's order. The Ninth Circuit initially granted the stay but later vacated it. The State sought an emergency stay in this Court. Justice Kennedy denied the State's request. App 119a. Accordingly, under compulsion of the district court's writ, the State released Clay from prison in June 2008.

Subsequently, in an unpublished memorandum decision, a three-judge panel of the Ninth Circuit affirmed the district court's judgment granting habeas corpus relief. The panel asserted that Clay's

commitment offense of first-degree murder "is no longer probative" and that Clay's criminal history of misdemeanors and numerous robberies "is unremarkable." App. 67a. And, discounting the remaining factors on which the Governor had relied, the panel claimed that Clay had participated in "sufficient" programming and that he had "adequate" parole plans. App. 67a. Explaining that, "*as a matter of California state law*, 'some evidence' of future dangerousness is essential for the denial of parole," the panel concluded that "here, there is no evidence in the record that would indicate that Clay poses a danger to the community if released." App. 66a (emphasis added). Based on this reweighing of the evidence, the panel held that "the Los Angeles Superior Court's decision . . . was an unreasonable application of California's 'some evidence' rule and was an unreasonable determination of the facts in light of the evidence presented. *Hayward*, 603 F.3d at 562-63; 28 U.S.C. § 2254(d)(1) and (2)." App. 67a.

## REASONS FOR GRANTING THE WRIT

The Ninth Circuit's decisions raise profound issues of comity and habeas corpus jurisdiction. In interfering on the substantive question of a prisoner's suitability for parole, the Ninth Circuit decisions strike at the heart of the State's special police powers.

In arriving at its indefensible decision to second-guess the State parole decisions, the Ninth Circuit violated any number of federalism principles. In second-guessing the state courts on their application of the *Rosenkrantz/Lawrence* "some evidence" test, the Ninth Circuit invaded the exclusive province of the state judiciary. And, in granting habeas corpus

relief on a novel procedural due process theory, the Ninth Circuit once again transgressed basic limits on its habeas corpus powers.

Further, the Ninth Circuit decisions will exert these harmful effects in numerous cases posing significant threats to public safety. Based on the Ninth Circuit's decisions, over 23,000 prisoners serving indeterminate life sentences in California will be eligible to enlist the federal court to sit as an additional arbiter of their parole suitability. Indeed, since 2008 over 1,500 district court petitions involving sufficiency-of-evidence challenges to California parole decisions and roughly 400 similar appeals in the Ninth Circuit have been filed. In the four months since *Hayward*, the federal courts already have invalidated twenty-six state parole decisions that the state courts had approved.

Moreover, the federal review the Ninth Circuit's authority provides to life prisoners is an unnecessary and duplicative review, for mere reasonableness, of the state court's application of a minimal "some evidence" test in at least one and as many as three levels of state judicial review.

### 1. The Ninth Circuit's decisions conflict with this Court's precedents recognizing the State's authority over parole-suitability determinations.

The Ninth Circuit's decisions—in Cooke's case, in Clay's case, and in *Hayward*—are directly at odds with this Court's precedent and the notion that parole is inherently a state process. As this Court has explained, "we have long been adverse to imposing federal requirements upon the parole systems of the States." *Pa. Bd. of Prob. & Parole* v. *Scott*, 524 U.S. 357, 369 (1998); see also *Morrissey* v.

*Brewer*, 408 U.S. 471, 490 (1972). "Our system of federalism encourages . . . state experimentation" in developing methods of determining parole suitability. *Greenholtz*, 442 U.S. at 13. And, as this Court has recognized, state parole determinations should not be "encumbered by procedures that states regard as burdensome and unwarranted," as that may provide incentive for states to abandon or curtail parole. *Id.* Indeed, states have "no duty" to establish a system of parole, because "there is no constitutional or inherent right of a convicted person to be conditionally released before the expiration of a valid sentence." *Id.* at 7. If a State chooses to establish a parole system, the State retains wide latitude in "defining the conditions for release and the factors that should be considered by the parole authority." *Id.* at 8.

State authorities, rather than federal courts, have expertise in making the predicative assessment of whether a given individual should be released into the community, and their parole decisions are an integral part of the State's overall administration of its system of corrections. "[B]eyond question, the authority of States over the administration of their criminal justice systems lies at the core of their sovereign status." *Oregon* v. *Ice*, 129 S. Ct. 711, 718 (2009). Federal courts "should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States." *Patterson* v. *New York*, 432 U.S. 197, 201 (1977). "The States must have due flexibility in formulating parole procedures and addressing problems associated with confinement and release." *Garner* v. *Jones*, 529 U.S. 244, 252 (2000).

This Court has never authorized federal habeas corpus relief for insufficiency of evidence supporting a State's determination that a prisoner is unsuitable

for parole under state-law criteria. Federal courts should not be drawn into the administration of the State's parole system or its individual parole decisions. To do so, as the Ninth Circuit has done here, the federal court must second-guess the State's parole authority, as well as the State's judiciary. The Ninth Circuit's intrusion into the State's parole decisions compromises important principles of federalism and inappropriately installs the federal judiciary as the final arbiter of an exclusive state function.

### 2. The Ninth Circuit's inappropriate intrusion into the state parole system rests on multiple violations of federalism and comity principles.

It is not surprising that, on its way to reaching the dubious result of second-guessing state parole decisions, the Ninth Circuit violated any number of traditional federalism principles. It "bootstrapped" a state-law standard of judicial review and untenably transformed it into a "liberty interest" protected by federal due process. It improperly intruded itself into second-guessing the state court's applications of state law. It placed burdens on the administration of state parole that exceeded the limits this Court laid down in *Greenholtz*. And, once again, it failed to abide by the standard requiring deferential review of state court judgments mandated by 28 U.S.C. § 2254. Each of these would warrant certiorari review by itself. That the Ninth Circuit committed such violations in seeking to justify the improbable result of its *Cooke* and *Clay* decisions further underscores the need for this Court's intervention by certiorari.

*The Ninth Circuit's decisions unjustifiably transform a state evidentiary standard into a "liberty interest"*

As if it somehow could support federal review of the substantive merits of a state parole-suitability decision, the Ninth Circuit held that California's standard of judicial review—for some evidence—is a component of a prisoner's liberty interest: It stated, "California's 'some evidence' requirement is a component of the liberty interest created by the parole system of that state." App. 18a.

But this holding is at odds with this Court's recognition that:

> Process is not an end in itself. Its constitutional purpose is to protect a substantive interest to which the individual has a legitimate claim of entitlement. . . . The State may choose to require procedures for reasons other than protection against deprivation of substantive rights, of course, but in making that choice the State does not create an independent substantive right.

*Olim* v. *Wakinekona*, 461 U.S. 238, 250-51 (1983). Thus, "an expectation of receiving process is not, without more, a liberty interest protected by the Due Process Clause." *Id.* at n.12.

The Ninth Circuit's approach further conflicts with that of other circuits. See, *e.g.*, *Brandon* v. *Dist. of Columbia Bd. of Parole*, 823 F.2d 644, 648 (D.C. Cir. 1987) ("Courts have explicitly and repeatedly rejected the proposition that an individual has an interest in a state-created procedural device, such as a hearing, that is entitled to constitutional due

process protection. . . . [T]he mere fact that the government has established certain procedures does not mean that the procedures thereby become substantive liberty interests entitled to federal constitutional protection under the Due Process Clause."); *Shango* v. *Jurich*, 681 F.2d 1091, 1100-01 (7th Cir. 1982) ("The argument that the procedures established by the regulations can themselves be considered a liberty interest is analytically indefensible."). *Cooke* and *Clay*, that is, may well have been decided differently in those circuits. This Court should intervene to assure consistency in the law in this area.

The Ninth Circuit's approach, confusing "liberty interest" with process, also threatens to elevate a dispute about any state procedure into a federal constitutional question. As this Court has long recognized, that would be an absurdity. See *Engle* v. *Isaac*, 456 U.S. 107, 121 n.21 (1982); *Beck* v. *Washington*, 369 U.S. 541, 554-55 (1961); *Gryger* v. *Burke*, 334 U.S. 728, 731 (1947). Constitutionalizing every state procedural right would stand any federal due-process analysis on its head.

Procedural due process questions are analyzed "in two steps: the first asks whether there exists a liberty . . . interest which has been interfered with by the State . . .; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient." *Ky. Dept. of Corr.* v. *Thompson*, 490 U.S. 454, 460 (1980). However, instead of identifying any liberty interest at stake and then identifying the process due before the individual can be deprived of that interest, the Ninth Circuit views the process as a substantive end in itself.

A prisoner's interest, if any, is in parole release, not in the procedures the State affords prisoners to protect against an arbitrary deprivation of that interest. See *Olim*, 461 U.S. at 250-51. Even on that point, it is questionable whether a California life prisoner has a constitutionally protected entitlement in parole release. The criteria for ascertaining whether such an interest exists are themselves uncertain. This Court in *Greenholtz*, 442 U.S. at 12, treated the question as one of a negative inference drawn from state statutes and regulations where they compel a certain outcome based upon a certain factual showing. But, in *Sandin* v. *Connor*, 515 U.S. 472 (1995), the Court re-framed the inquiry as one focusing on whether the prisoner would suffer an "atypical and significant hardship." See *Wilkinson* v. *Austin*, 545 U.S. 209, 229 (2005) (*Sandin* abrogated *Greenholtz*'s methodology for establishing a liberty interest).

*The Ninth Circuit's decisions intrude into the state courts' resolution of state-law questions*

The Ninth Circuit's inappropriate assertion of authority to review the substance of state parole decisions finds no support in procedural due-process jurisprudence. To the contrary, it entangles the federal court in improper second-guessing of state-law decisions.

There is a basic difference between an alleged liberty interest created by state law and any procedural protection of that interest required under the Due Process Clause. See *Wolff* v. *McDonnell*, 418 U.S. 539, 557 (1974) (liberty interest "entitle[s] [inmate] to those minimum procedures appropriate under the circumstances and required by the Due

Process Clause to insure that the state-created right is not arbitrarily abrogated"); *Austin*, 545 U.S. at 224 ("[a] liberty interest having been established, we turn to the question of what process is due"). While States may provide more protection than required by the federal Constitution, any additional standards imposed by the State do not thereby become federal constitutional protections. See *Austin*, 545 U.S. at 224; see also *Sandin*, 515 U.S. at 481-82; *California* v. *Ramos*, 463 U.S. 992, 1013-14 (1983) ("It is elementary that States are free to provide greater protections in their criminal justice system than the Federal Constitution requires."). Overlooking that basic difference, however, the Ninth Circuit erroneously arrogated to itself the power to enforce California's state-law "some-evidence" rule of judicial review. App. 17a, 67a.

Not only did the Ninth Circuit violate this Court's decisions distinguishing between the alleged state interest and the claimed federal process, it also violated this Court's precedents recognizing that the federal habeas court has no power to remedy perceived violations of state law. *Estelle* v. *McGuire*, 502 U.S. 62, 67-68 (1991) ("[W]e reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions."); *Pulley* v. *Harris*, 465 U.S. 37, 41 (1984) ("A federal court may not issue the writ on the basis of a perceived error of state law."); *Milton* v. *Wainwright*, 407 U.S. 371, 377 (1972) ("The writ of habeas corpus has limited scope; the federal courts do not sit to re-try state cases de novo but, rather, to review for violation of federal constitutional standards."). The federal interest, if any, is in the adequacy of the procedures, not in the substantive correctness of the result under state law. That is a

state-law question reserved exclusively to the state courts.

*The Ninth Circuit's decisions impose on the State an obligation rejected by this Court in* Greenholtz

The Ninth Circuit's notion in *Cooke* and *Clay* that federal due process requires review of a state parole decision for "some evidence" is contrary to this Court's holding in *Greenholtz*. *Greenholtz* established the contours of any constitutional process "due" in a case such as this one: an opportunity to be heard and a statement of reasons why parole was denied. 442 U.S. at 16. *Greenholtz*, further, specifically recognized that "[t]he Constitution does not require more." *Id.* California provides the *Greenholtz* protections, and more. It provides life-term prisoners the right to review their prison files; appear at, and participate in, a hearing before two Board commissioners; receive a stenographic recording of the proceedings; if parole is denied, receive a written statement setting forth the reasons for the denial; and to have parole consideration hearings at regular intervals. Cal. Penal Code §§ 3041, 3041.5. Further, under California law, parole decisions are also subject to state judicial review for some evidence. As in these cases, the state process allows resort to three levels of state courts. Surely these are sufficient protections to ensure basic reliability of the process.

*The Ninth Circuit's decisions fail to afford the state court adjudications the deference required by 28 U.S.C. § 2254*

The Ninth Circuit's decisions to grant habeas corpus relief on parole-suitability grounds, finally, runs afoul of the deferential-review standard that strictly limits federal habeas corpus relief in cases brought by state prisoners.

Under 28 U.S.C. § 2254(d), federal habeas corpus relief "shall not be granted" on a claim adjudicated on the merits by the state court. Here, the state courts adjudicated respondent Cooke's and respondent Clay's federal claims on their merits. App. 42a, 104a.

To become eligible for relief, then, Cooke and Clay must establish an exception to § 2254(d)'s basic rule. That is, they must show that the state court's decision of the federal claim was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," § 2254(d)(1), or that the state court's rejection of an otherwise valid federal claim was based on an unreasonable determination of the facts, § 2254(a), (d)(2). "Clearly established" federal law under § 2254(d)(1) is limited to the strict holdings of this Court's precedents squarely addressing the question raised by the petitioner's claim at the time the state court rendered its decision— not "dicta" and not mere circuit-court authority. *Renico* v. *Lett*, 130 S. Ct. 1855, 1865-66 (2010); *Wright* v. *Van Patten*, 552 U.S. 120, 126 (2008) (per curiam); *Williams* v. *Taylor*, 529 U.S. 362, 412 (2000).

This Court has "squarely addressed" the process due in a state parole proceeding only in *Greenholtz*, and there it did so only in light of the Nebraska

system. *Greenholtz* held that "the Constitution does not require more" than an opportunity to be heard and a statement of the reasons why parole was denied. *Greenholtz*, 442 U.S. at 15-16. In doing so, this Court expressly rejected the claim that evidentiary support is required in the parole context, holding instead that "nothing in the due process concepts . . . requires the Parole Board to specify the particular 'evidence' in the inmate's file or at his interview on which it rests the discretionary determination that an inmate is not ready for conditional release." *Id.* at 15.

Here, then, it cannot be said that the state-court's decisions—even if they were "incorrect" or "unreasonable" in finding "some evidence" to support the denial of parole—violated "clearly established" law. For Cooke's and Clay's constitutional sufficiency-of-evidence claim was a novel one of a type never before endorsed by this Court as applicable to the question of parole suitability. The Ninth Circuit erred under § 2254(d) in granting relief on such a claim.

* * *

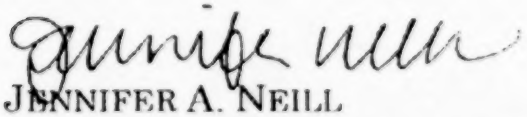
The Ninth Circuit's decision to grant habeas corpus relief based on its own view of a state prisoner's suitability for parole is a serious violation of principles of federalism. The error of its decision in this regard is underscored by its many other missteps, each transgressing federalism a little further and each independently warranting certiorari review, on the way to such an improbable result.

## CONCLUSION

The consolidated petition for writ of certiorari should be granted.

Respectfully submitted,

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September 2, 2010

# APPENDIX

Supreme Court, U.S.
FILED

No. 10- 10-333 SEP 2 - 2010

OFFICE OF THE CLERK

# In the Supreme Court of the United States

GARY SWARTHOUT, *Petitioner*,

v.

DAMON COOKE, *Respondent*.

MATTHEW CATE, *Petitioner*,

v.

ELIJAH CLAY, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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United States Court of Appeals,
Ninth Circuit.
Damon COOKE, Petitioner-Appellant,
v.
Jose SOLIS, Warden, California Training Facility-Central; Board of Prison Terms; A. Kane, Respondents-Appellees.
**No. 06-15444.**

Argued and Submitted April 16, 2007.
Submission Vacated Aug. 7, 2007.
Resubmitted May 28, 2010.
Filed June 4, 2010.

**Background:** Following denial of his state court petitions for habeas relief from decision which denied him parole, inmate petitioned in federal court for writ of habeas corpus. The United States District Court for the Northern District of California, Martin J. Jenkins, J., denied the petition, and inmate appealed.

**Holdings:** The Court of Appeals, Reinhardt, Circuit Judge, held that:

(1) Court would grant a certificate of appealability (COA) sua sponte, and

(2) state court's decision to deny inmate's petition for habeas relief was based on an unreasonable determination of the facts in light of the evidence.

Reversed and remanded with instructions.

West Headnotes

**[1] Habeas Corpus 197 ⚿842**

197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
197III(D) Review
197III(D)2 Scope and Standards of Review
197k842 k. Review de novo. Most Cited

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**[2] Habeas Corpus 197 ⚿818**
197 Habeas Corpus
197III Jurisdiction, Proceedings, and Relief
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197III(D)1 In General
197k817 Requisites and Proceedings for Transfer of Cause
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Court of Appeals would grant a certificate of appealability (COA) sua sponte where habeas petitioner's failure to obtain a COA when appealing the denial of his petition was in accordance with prior decisions and he made a substantial showing of the denial of a constitutional right. 28 U.S.C.A. § 2253(c).
**[3] Habeas Corpus 197 ⚿450.1**
197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(A) Ground and Nature of Restraint
197k450 Federal Review of State or Territorial Cases
197k450.1 k. In general. Most Cited Cases
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197 Habeas Corpus
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197II(A) Ground and Nature of Restraint
197k450 Federal Review of State or Territorial Cases
197k452 k. Federal or constitutional questions. Most Cited Cases
Under the Antiterrorism and Effective Death Penalty

Act (AEDPA), Court of Appeals may not grant relief in a habeas proceeding unless the state court's adjudication of the petitioner's claim resulted in a decision that was either (1) contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or (2) based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. 28 U.S.C.A. § 2254(d)(1, 2).

**[4] Constitutional Law 92 ⚿4838**

92 Constitutional Law

92XXVII Due Process

92XXVII(H) Criminal Law

92XXVII(H)12 Other Particular Issues and Applications

92k4838 k. Parole. Most Cited Cases

State parole systems may create liberty interests in parole release that are entitled to protection under the Due Process Clause. U.S.C.A. Const.Amend. 14.

**[5] Pardon and Parole 284 ⚿49**

284 Pardon and Parole

284II Parole

284k48 Eligibility for Parole or Parole Consideration

284k49 k. Factors governing decision, in general. Most Cited Cases

**Pardon and Parole 284 ⚿61**

284 Pardon and Parole

284II Parole

284k57 Proceedings

284k61 k. Reasons for decision. Most Cited Cases

Under California law, paramount consideration for both the Board and the Governor in a parole proceeding must be whether the inmate currently

poses a threat to public safety and thus may not be released on parole, and the facts relied upon by the Board or the Governor must support the ultimate decision that the inmate remains a threat to public safety.

**[6] Pardon and Parole 284 ⚿62**

284 Pardon and Parole

284II Parole

284k57 Proceedings

284k62 k. Review. Most Cited Cases

A court reviewing a decision in a California parole proceeding must consider whether the identified facts are probative to the central issue of current dangerousness when considered in light of the full record before the Board or the Governor.

**[7] Habeas Corpus 197 ⚿516.1**

197 Habeas Corpus

197II Grounds for Relief; Illegality of Restraint

197II(B) Particular Defects and Authority for Detention in General

197k516 Pardon and Parole

197k516.1 k. In general. Most Cited Cases

State court's decision to deny inmate's petition for habeas relief from denial of parole, on basis that some evidence supported the California parole Board's decision, was based on an unreasonable determination of the facts in light of the evidence; Board's current dangerousness finding was based on improper consideration of a psychological evaluation which it had found unreliable, a disciplinary infraction which had been dismissed as unsubstantiated, and two minor and non-violent disciplinary infractions, and no evidence supported its finding that inmate needed further programming to become non-dangerous and that he needed

certification in a trade to make himself marketable after his release. 28 U.S.C.A. § 2254(d)(2).

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Jessica Nicole Blonien (argued), Office of the California Attorney General, Sacramento, CA; Elizabeth S. Kim, Office of the California Attorney General, Oakland, CA, for the respondents-appellees.

Appeal from the United States District Court for the Northern District of California, Martin J. Jenkins, District Judge, Presiding. D.C. No. CV-04-04439-MJJ.

Before: STEPHEN REINHARDT, KIM McLANE WARDLAW and MILAN D. SMITH, JR., Circuit Judges.

REINHARDT, Circuit Judge:

In 1991, Damon Cooke was convicted of attempted first degree murder. He was sentenced to seven years to life in prison with the possibility of parole, plus a four-year enhancement for using a firearm. In November 2002, the California Board of Prison Terms FN1 held a hearing to determine whether Cooke was suitable for parole. At the conclusion of the hearing, the Board denied him parole, relying primarily on the circumstances of the commitment offense.

FN1. On July 1, 2005, the California Board of Parole Hearings replaced the Board of Prison Terms. Cal.Penal Code § 5075(a).

Cooke sought a writ of habeas corpus in state court, asserting that the Board's decision violated his right to due process. Finding that the Board's decision was supported by "some evidence" of unsuitability, the state courts denied the petition. Cooke then sought a writ of habeas corpus in federal court. The district

court denied the petition, and Cooke timely filed a notice of appeal on October 14, 2005.

*1208 We now conclude that, under the standard announced in *Hayward v. Marshall*, 603 F.3d 546 (9th Cir.2010) (en banc),[FN2] Cooke is entitled to federal habeas relief. Accordingly, we reverse the decision of the district court and remand with instructions to grant the writ.

> FN2. *Hayward*, 603 F.3d at 561-63 (holding that federal habeas courts reviewing a due process challenge to the denial of parole in California must determine "whether the California judicial decision approving the [Board's] decision rejecting parole was an 'unreasonable application' of the California 'some evidence' requirement, or was 'based on an unreasonable determination of the facts in light of the evidence.' ") (quoting 28 U.S.C. 2254(d)(1)-(2)). We note that the district court did not have the benefit of our en banc decision in *Hayward* when it decided Cooke's petition.

I.

A.

On February 12, 1991, Cooke's friend Padriac Ryan came to visit him at his apartment in Los Angeles. After Ryan returned to his own home in Berkeley, Cooke noticed that a necklace was missing from the apartment.[FN3]

> FN3. This description of the offense is drawn primarily from the California Court of Appeals' opinion affirming Cooke's conviction. *People v. Cooke*, 16 Cal.App.4th 1361, 1364-67, 1375, 20 Cal.Rptr.2d 506 (1993). The opinion states that the missing item was a $10,000 necklace. *Id.*

> Before the Board, Cooke stated that, in fact, $10,000 in cash and a necklace were missing from his apartment.

That night, Cooke traveled from Los Angeles to Berkeley with his cousin LeAndre and his friends Alexander Bush and Steve Huynh. When Cooke and his companions confronted Ryan about the theft of the necklace, Ryan denied responsibility, and an argument ensued. LeAndre pulled out a .38 caliber pistol, which Cooke took from him. Cooke then fired a single shot, which struck Ryan on the right side of the head. Ryan fell to the ground and pretended to be dead, and Cooke, LeAndre, Bush, and Huynh fled the scene.

The shooting was not fatal.[FN4] After the four men had fled, Ryan got up, locked his door, and called 911. The police stopped Cooke and his companions a few blocks away. Cooke was subsequently arrested and charged with attempted first-degree murder.

> FN4. Ryan suffered a fractured cheekbone and partial hearing loss in one ear as a result of the shooting.

On October 2, 1991, Cooke was convicted of attempted first-degree murder with an enhancement for use of a firearm. On December 18, 1991, he was sentenced to seven years to life in prison with the possibility of parole for the attempted murder conviction, plus four additional years for the firearm enhancement.

B.

On November 19, 2002, the California Board of Prison Terms held a hearing to evaluate Cooke's suitability for parole. During the hearing, the Board heard evidence regarding Cooke's life history, his commitment offense, his behavior and achievements while incarcerated, his mental health, and his post-

release plans.

With respect to Cooke's background, the Board learned that Cooke had never been arrested prior to the commitment offense. He did not drink or use drugs, and he had never been involved in gang activity. He has close and stable relationships with his mother, who is a financial consultant, and his stepfather, who is a retired Los Angeles County Probation Officer.

Cooke attended El Dorado High School in Placentia, California and graduated with a 3.5 GPA. He then enrolled in an ROTC program, through which he attended the New Mexico Military Institute. Thereafter*1209 he pursued a degree in finance at the University of New Mexico. During his final year of college, his mother had bypass surgery, and he left school in order to care for her. He later passed the National Association of Securities Dealers exam and began work as a financial consultant.

During his time in prison, Cooke has been both well-behaved and extremely industrious. He successfully completed numerous voluntary self-help and educational programs, including a thirteen-week IMPACT program ("a self-help group designed to provide an opportunity for education and awareness as to the profound negative impact of crime on its victims") and numerous anger and stress management classes. Because only limited self-help and therapeutic programming was offered in the prisons in which he was incarcerated, he took it upon himself to read and write reports about various self-help books. He also participated in various Christian and Buddhist groups, and became an ordained minister. At the time of the hearing, he was in the process of acquiring college credits via correspondence from Coastline Community College,

with the hope that the University of New Mexico would accept the credits toward completion of his bachelor's degree in finance.

Cooke has held numerous jobs while in prison, including teacher's aide, education clerk, and personnel clerk. His supervisors have raved about his job performance, extolling his "exceptional[ ] diligen[ce]," "positive working attitude," "university level writing ability," "astounding ability under duress," "excellent people skills," and "exceptional work" product. They have also noted that he "contributes above and beyond expectations," is a "positive influence on others," "always remains in control of himself," and "shows a great deal of respect towards his peers, and staff alike." A teacher under whom Cooke worked as an aide for almost two years stated that

> His contribution towards the overall success of my academic class ... was both monumental and unselfish.... [He] was an asset to my program because of his ability to retain a positive attitude in the face of adversity. This attribute was and continues to be a rare and seldom attained commodity in the working environment of my chosen profession. His social skills and patience when working with both free staff and inmates was impeccable.

Various corrections officials have noted that Cooke has consistently "go[ne] above and beyond to help his fellow inmates." For several years Cooke has helped to facilitate the prison's literacy and stress management courses. The corrections officer who supervised him in this role noted that Cooke's efforts resulted in a "drastic increase in other inmates' willingness to work and become productive individuals." Cooke also participated in the making

of an educational video for juvenile offenders regarding the consequences of criminal activity. The corrections officer who supervised this effort stated that Cooke's "knowledge, insight, and professional demeanor reflects the epitome of the program." Furthermore, "using his skills in the area of computers, [Cooke] was able to establish a self-help curriculum that provided inmates the opportunity to receive basic computer training, and ultimately, receive their General Education Diplomas (GED's)." Cooke has also helped to organize an annual festival for the children of the inmates at Soledad State Prison, "has been an advisor in various anger management groups, ... works closely with ministry groups ... [and] has been utilized to quell conflicts that have arisen between staff and inmates."

***1210** In addition to commending his work performance, volunteer efforts, and impeccable conduct, numerous corrections officers placed notations in Cooke's file expressing their belief that the Board should find him suitable for parole. For example, corrections officers made the following statements:

> "I can honestly say that Inmate Cooke is one of the best mentors and positive Inmate Advisors I have ever experienced in my fifteen (15) year tenure with the California Department of Corrections. I highly recommend Inmate Cooke for any parole consideration he may be eligible for...."
>
> "Any consideration you may give with regards to inmate Cooke's parole considerations comes with the endorsement of the undersigned."
>
> "It has come to my attention that Inmate Cooke is scheduled for a parole board hearing for consideration of a parole date. I completely

> recommend Cooke be given the opportunity to reenter society as a fully productive citizen."
>
> "I fully recommend that Inmate Cooke be given strong consideration for parole. I expect and anticipate that he will continue his helpful deeds and become a positive asset to the community."
>
> "Any consideration given regarding Inmate Cooke's release ... would be a great service to society."
>
> "I sincerely believe that if given the opportunity he would be a productive citizen. I fully recommend his consideration for parole and release."

In addition, a Correctional Lieutenant stated, "during my five year working relationship with him ... Cooke has exemplified the epitome of a rehabilitated inmate."

Cooke stated at the hearing that if he were released, he planned to live with his wife in the home they own in Ontario, California. Several employers had offered to hire him upon his release. The offers included a "guaranteed job placement" with the Clair Foundation, a part-time position as a computer assistant for a general contractor, and a full-time telemarketing position with Prudential Realty. The Board also reviewed letters from several of Cooke's relatives who stated that they would assist him both financially and emotionally upon his release from prison. In total, twenty-nine of Cooke's family members and close friends wrote letters to the Board requesting that he be granted parole. The Board received no letter or other statement of opposition to parole from the district attorney's office or any law enforcement agency.

The Board also reviewed two psychological evaluations prepared by prison psychologists, both of which stated that Cooke suffers no mental health problems. The first evaluation, dated October 9, 1996, described Cooke as a "self-motivated person" who "can be counted on to maintain or improve the gains made while he has been incarcerated." The second evaluation, dated February 14, 2000, and specifically prepared for Cooke's November 2002 hearing, described Cooke as "an exemplary inmate" and stated that Cooke would "not present a problem to society" if released. The evaluation contained some inaccurate information with respect to Cooke's ethnicity and family background. FN5 Because there were "so many inconsistent and erroneous *1211 statements" in the second report, the Board determined that it "lack [ed] credibility," and thus said that it would order another report.

> FN5. Specifically, the report stated that Cooke is Polynesian, when in fact he is of mixed African American and Polynesian descent; identified Cooke's family's religious affiliation as Mormon, when in fact they are "nondenominational"; and stated that Cooke's parents divorced when he was twelve years old, when in fact they divorced when he was five. In addition, although a later section of the report contained accurate information about Cooke's marital status, the first page of the report described him as "single married."

The Board also reviewed Cooke's disciplinary record. Cooke had received only two written disciplinary infractions; they were issued within five months of each other and both were issued during the first year and a half of his incarceration. In September of 1992, he was issued a disciplinary citation for not following

orders when a corrections officer told him to remove food from another prisoner's tray.[FN6] In February of 1993, he was issued a second citation for refusing to clean up another inmate's feces when asked to do so by a corrections officer. Cooke accepted responsibility for both violations.

> FN6. When asked about this disciplinary infraction, Cooke explained to the Board that "there's a thing with prisoners that another prisoner shouldn't touch another man's food. And so what happened was my supervisor said, there is four hot dogs on this tray. Take two off. And I just told him I really-I said, honestly, I can't do that. I can't take food off another man's tray."

The Board also discussed a third disciplinary infraction that appeared in Cooke's file, for possession and trafficking of marijuana. Cooke's attorney informed the Board that because prison officials had found that the charge was unfounded, it had been dismissed, and therefore it should not have been in Cooke's file. The Board said that it would look into the issue further, but nonetheless considered this alleged infraction in deeming Cooke unsuitable for parole. The record reflects that the charge was, in fact, dismissed and thus should not have been considered by the Board.

Finally, the Board reviewed Cooke's 2002 Life Pris oner Evaluation, which had been prepared by Cooke's corrections counselor and was based on the information before the Board as well as his own experience supervising Cooke. In the report, the counselor concluded that

> [c]onsidering the commitment offense, prior record and prison adjustment, the writer believes the prisoner would probably pose a low

> degree of threat to the public at this time, if released from prison. This belief is based on Inmate Cooke not having any prior record of criminal conduct ... and the circumstances of the instant offense. He does not appear to be criminally minded and has a good insight into himself. Inmate Cooke has been able to maintain himself relatively disciplinary free during the 11 years of incarceration. Inmate Cooke has shown marked progress toward maintaining an overall positive program and attitude.

After reviewing the foregoing evidence, the Board determined that Cooke was unsuitable for parole because he "would pose an unreasonable risk to society if released from prison." The Board based this determination on the following findings:

> Firstly, the commitment offense was carried out in an especially cruel and callous manner. It was carried out in a premeditated manner. It was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering. .... Institutionally, [the inmate] has not yet fully participated in beneficial self-help and/or therapy programming. He has not yet developed a marketable skill that can be put to use upon release. He's had two [disciplinary violations] ... One ... for ... possession, trafficking marijuana.... [A]nother ... for disobeying rules and regulations. The psych report dated 2/14/2000 is ... favorable. But it lacks credibility with myself and with the Panel.... [T]he prisoner does need self-*1212 help and/or therapy programming in order to face, discuss, understand, and cope with stress in a nondestructive manner. And to face,

> discuss, and understand the causative factors that led to the life crime. Until progress is made, he continues to be unpredictable and a threat to others. .... He needs to complete a vocation.

After the Board orally stated these findings, Cooke asked for advice about what he could do "in order to be found suitable." The Board explained that he needed to complete a vocation because "it not only shows that you ... can grow as a person[, it also] ... shows that you can set goals and complete goals and get something done."

C.

On December 19, 2003, Cooke filed a petition for a writ of habeas corpus in Alameda County Superior Court. Three days later, on December 22, 2003, the court denied the petition. In its entirety, the order denying the petition reads as follows:

> The Court having reviewed the defendant's Ex Parte Petition for Writ of Habeas Corpus, filed on December 19, 2003, orders said motion be DENIED. The Petition fails to state a prima facie case for relief sought. The record submitted by Petitioner does not support the Petitioner's claims that his Constitutional and statutory rights were violated by the [Board of Prison Terms]. The record indicates that there was some evidence, including but certainly not limited to the life offense, to support the board's denial of Petitioner's parole.

Cooke filed a habeas petition with the California Court of Appeal, and subsequently a petition for review with the California Supreme Court. Both were summarily denied.

On October 18, 2004, Cooke filed a habeas corpus petition in federal court. The district court denied the

petition and entered judgment on October 6, 2005. On October 14, 2005, Cooke timely filed a notice of appeal.

II.

[1] "We review de novo a district court's decision to deny a petition for habeas corpus." *Bailey v. Hill*, 599 F.3d 976, 978 (9th Cir.2010).

[2] The State contends that we lack jurisdiction over this appeal because Cooke has not obtained a certificate of appealability, as required under 28 U.S.C. § 2253(c). Cooke originally applied for a certificate of appealability in the district court, but withdrew his application in light of our decision in *Rosas v. Nielsen*, 428 F.3d 1229, 1232 (9th Cir.2005), which held that afederal habeas petitioner challenging the denial of parole was not required to obtain a certificate of appealability. In *Hayward v. Marshall*, 603 F.3d 546 (9th Cir.2010) (en banc), however, we overruled *Rosas* and held that a federal habeas petitioner must obtain a certificate of appealability to invoke appellate jurisdiction over this type of claim. "We may issue such a certificate *sua sponte*," *id.* at 554, and we do so here. Like the petitioner in *Hayward*, Cooke "had followed our prior decisions when he proceeded without a certificate, and he has 'made a substantial showing of the denial of a constitutional right.' " *Id.* at 554-55 (quoting 28 U.S.C. § 2253(c)(2)). We therefore certify for appeal the issue whether Cooke was denied parole in the absence of "some evidence" of current dangerousness, and thus in violation of his federal right to due process.[FN7]

FN7. Because we resolve this issue in Cooke's favor, we need not reach the other issues that he raises on appeal.

*1213 [3] Because Cooke filed his habeas petition

after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), we may not grant relief unless the state court's adjudication of his claim "resulted in a decision that was either (1) contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or (2) based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Doody v. Schriro*, 596 F.3d 620, 634 (9th Cir.2010) (en banc) (citation omitted).

The State contends that the constraints imposed by AEDPA preclude federal habeas relief on Cooke's claim. This argument is foreclosed by our recent decision in *Hayward v. Marshall*. *See also Pearson v. Muntz*, 606 F.3d 606 (9th Cir.2010). In *Hayward*, we held that due process challenges to California courts' application of the "some evidence" requirement are cognizable on federal habeas review under AEDPA. *Hayward*, 603 F.3d at 561-64. Under the standard announced in *Hayward* for California parole cases, federal habeas courts must accord due deference to the state court decision and thus must determine "whether the California judicial decision approving the governor's [or the Board's] decision rejecting parole was an 'unreasonable application' of the California 'some evidence' requirement, or was 'based on an unrea sonable determination of the facts in light of the evidence.' " *Id.* at 563 (quoting 28 U.S.C. § 2254(d)(1)-(2)). It is to that question we now turn.

III.

As we have noted, the last reasoned state court decision addressing Cooke's claim stated that the record contained "some evidence, including but certainly not limited to the life offense, to support the

board's denial of [Cooke's] parole." To determine whether this decision "was an 'unreasonable application' of the California 'some evidence' requirement, or was 'based on an unreasonable determination of the facts in light of the evidence,' " *id.* (quoting 28 U.S.C. § 2254(d)(1)-(2)), we must examine the nature and scope of the federally enforceable liberty interest created by California's "some evidence" requirement.

A.

[4] State parole systems "may create liberty interests in parole release that are entitled to protection under the Due Process Clause." *Bd. of Pardons v. Allen*, 482 U.S. 369, 371, 107 S.Ct. 2415, 96 L.Ed.2d 303 (1987) (citing *Greenholtz v. Inmates of Neb. Penal & Corr. Complex*, 442 U.S. 1, 12, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979)). California's "some evidence" requirement is a component of the liberty interest created by the parole system of that state. In *Greenholtz*, the Supreme Court lamented that the absence of litigation of the issue in state court had "denied [it] the benefit of the Nebraska courts' interpretation of the scope of the interest, if any, the [Nebraska parole] statute was intended to afford to inmates." 442 U.S. at 12, 99 S.Ct. 2100. Here, in determining whether the decision of the Alameda County Superior Court was an unreasonable application of California's "some evidence" requirement, we have the benefit of extensive guidance from the California Supreme Court as to the scope of the liberty interest at issue.

The California Supreme Court has explained that the "some evidence" requirement is mandated by the state regulatory, statutory, and constitutional provisions that govern parole decisions in California. *In re Rosenkrantz*, 29 Cal.4th 616, 128 Cal.Rptr.2d

104, 59 P.3d 174, 201-03 (2002). The requirement imposes substantive rather than purely procedural constraints on state officials' discretion to *1214 grant or deny parole: "a reviewing court ... is not bound to affirm a parole decision merely because the Board or the Governor has adhered to all procedural safeguards." *In re Lawrence*, 44 Cal.4th 1181, 82 Cal.Rptr.3d 169, 190 P.3d 535, 552 (2008). Rather, the court must ensure that the decision to deny parole is "supported by some *evidence*, not merely by a hunch or intuition." *Id.* at 554.

[5] Under California law, "the paramount consideration for both the Board and the Governor" must be "whether the inmate currently poses a threat to public safety and thus may not be released on parole," *id.* at 552, and "the facts relied upon by the Board or the Governor [must] support the ultimate decision that the inmate remains a threat to public safety." *Id.* at 554. Accordingly, for a reviewing court "the relevant inquiry is whether some evidence supports the *decision* of the Board or the Governor that the inmate constitutes a current threat to public safety." *Id.* at 553; *see also Hayward*, 603 F.3d at 562 (noting that " 'some evidence' of future dangerousness is indeed a state *sine qua non* for denial of parole in California") (citing *Lawrence*, 82 Cal.Rptr.3d 169, 190 P.3d at 549; *In re Shaputis*, 44 Cal.4th 1241, 82 Cal.Rptr.3d 213, 190 P.3d 573, 582 (2008)).

[6] The California Supreme Court has expressly rejected the argument "that the aggravated circumstances of a commitment offense inherently establish current dangerousness." *Lawrence*, 82 Cal.Rptr.3d 169, 190 P.3d at 554. Although the Board or the Governor may consider the circumstances of the commitment offense when

making a decision to grant or deny parole,

> the aggravated nature of the crime does not in and of itself provide some evidence of *current* dangerousness to the public unless the record also establishes that something in the prisoner's pre- or post-incarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative to the statutory determination of a continuing threat to public safety.

*Id.* at 555 (cited in *Hayward*, 603 F.3d at 562). In sum, a reviewing court must consider "whether the identified facts are *probative* to the central issue of *current* dangerousness when considered in light of the full record before the Board or the Governor." *Id.* at 560. Thus, there must be more than the crime or its circumstances alone to justify the Board's or the Governor's finding of current dangerousness.[FN8]

> FN8. In *Hayward*, we used "current dangerousness" and "future dangerousness" interchangeably when referring to the finding for which there must be "some evidence." There is no meaningful distinction between the two terms.

B.

Bearing in mind the foregoing considerations as to the scope of the federally enforceable liberty interest created by California's "some evidence" requirement, we turn now to the state court decision upholding Cooke's denial of parole. As we have noted, the state court found that the Board's decision was supported by some evidence "including but certainly not limited to the life offense." Because the state court's decision does not reveal which of the Board's findings it

believes supported the denial of parole, other than "the life offense," and which, if any, did not, we will examine each of the Board's other stated reasons for denying parole.

***1215** One of the bases upon which the Board deemed Cooke unsuitable for parole was the finding that the February 14, 2000 psychological evaluation prepared for the hearing was unreliable. The record supports the Board's finding that the evaluation contained numerous errors and inconsistencies, and the Board was clearly justified in disregarding it in its entirety. A properly disregarded piece of favorable evidence, however, cannot possibly constitute evidence of current dangerousness; that proposition is illogical on its face. Evidence that is excluded is not probative of anything.

The Board also relied on the disciplinary infractions contained in Cooke's file: one for trafficking marijuana, and two for disobeying prison rules and regulations. As noted *supra,* the marijuana trafficking charge had been dismissed as unsubstantiated, and thus should not have been considered by the Board. The other two offenses occurred within the first year and a half of Cooke's imprisonment; one was based on Cooke's refusal to clean up another's man's feces, and the other on his refusal to take food off another man'stray. These two minor and non-violent occurrences, which occurred in 1992 and 1993, cannot reasonably be viewed as evidence that Cooke posed an unreasonable risk to public safety in 2002, especially as he had been discipline-free for nearly a decade. Accordingly, Cooke's disciplinary record does not provide evidence of current dangerousness.

Next, the Board found that Cooke "has not yet fully participated in beneficial self-help and/or therapy

programming," and that he needed more of such programming to "cope with stress in a nondestructive manner" and to "face, discuss, [and] understand the causative factors that led to the life crime." The Board, however, failed to identify any evidence that supports such a conclusion. Cooke has received numerous accolades for his extensive participation in self-help groups and programming; indeed, he has designed such programming and is now leading such groups. Nothing in the record so much as hints at the possibility that Cooke might need further programming in order to become non-dangerous, or even that he suffered from stress of any kind while in prison. Accordingly, the Board's bare assertion that Cooke needs additional programming cannot reasonably be viewed as providing evidence that supports a finding of current dangerousness.

Similarly, the Board found that Cooke needed to obtain certification in a trade to make himself marketable after his release and to demonstrate that he "can grow as a person ... can set goals, ... complete goals and get something done." This finding, again, is wholly without evidentiary support. The record before the Board demonstrates that Cooke has a strong educational background-he graduated from high school with a high grade point average, attended the University of New Mexico, and was close to completing a bachelor's degree in finance-and possesses many marketable skills. Nothing in the record suggests that Cooke would have any difficulty obtaining employment upon release; to the contrary, the Board recognized that he had several standing job offers in a range of fields, from counseling to information technology to real estate. Moreover, the record was full of praise for Cooke's ability to grow as a person, to set goals for himself, and to complete

tasks. Indeed, the record was replete with glowing praise from Cooke's supervisors regarding his exceptional diligence, positive attitude, and strong work ethic. No evidence suggests that Cooke's certification in a trade would have any bene fit, let alone that such certification is necessary to render him non-dangerous. Accordingly, the Board's wholly unsupported *sua sponte* ***1216** finding with regard to Cooke's failure to obtain certification in a trade does not provide evidence of current dangerousness.

The remaining findings the Board deemed supportive of a denial of parole all relate to the circumstances of Cooke's commitment offense. We need not decide whether these findings are themselves supported by the record, however, because they cannot, standing alone, constitute the requisite evidence of current dangerousness. As the California Supreme Court has held, the circumstances of a commitment offense cannot constitute evidentiary support for the denial of parole "unless the record also establishes that something in the prisoner's pre- or post-incarceration history, or his or her current demeanor and mental state, indicates that the implications regarding the prisoner's dangerousness that derive from his or her commission of the commitment offense remain probative to the statutory determination of a continuing threat to public safety." *Lawrence*, 82 Cal.Rptr.3d 169, 190 P.3d at 555. Cooke had no pre-incarceration history suggesting dangerousness; no history during his time in prison that would support such a finding; no testimony, report, or other evidence regarding a hostile demeanor; and no indication of a disturbed mental state or a mental state that would otherwise suggest current dangerousness. Accordingly, assuming the validity of the Board's findings as to the circumstances of the

commitment offense, there is no other evidence that would, as required by *Lawrence*, reasonably support the finding of "some evidence" of current dangerousness.

[7] In sum, each of the Board's findings (other than those regarding the circumstances of the commitment offense) [FN9] lacked any evidentiary basis. Nothing in the record supports the state court's finding that there was "some evidence" in addition to the circumstances of the commitment offense to support the Board's denial of Petitioner's parole. The Parole Board's findings were individually and *in toto* unreasonable because they were without evidentiary support. When habeas courts review the "some evidence" requirement in California parole cases, both the subsidiary findings and the ultimate finding of some evidence constitute factual findings. Here, there was no evidence that reasonably supports either the necessary subsidiary findings or the ultimate "some evidence" finding. Accordingly, we hold that the state court decision was " 'based on an unreasonable determination of the facts in light of the evidence.' " *Hayward*, 603 F.3d at 563 (quoting 28 U.S.C. § 2254(d)(2)). Cooke is entitled to a writ of habeas corpus.

> FN9. As we have explained, we need not and do not decide whether the Board's findings with regard to the circumstances of the commitment offense are supported by the record. We simply assume, for purposes of this opinion, that they are.

IV.

For the foregoing reasons, we reverse the district court and remand with instructions to grant the writ.

REVERSED and REMANDED.

C.A.9 (Cal.),2010.

Cooke v. Solis

606 F.3d 1206, 10 Cal. Daily Op. Serv. 6994

END OF DOCUMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

[Filed 10/05/2005]
No. C 04-04439 MJJ

DAMON COOKE,

Petitioner,

vs.

JOSE SOLIS,

Respondent. /

ORDER DENYING
PETITION FOR WRIT
OF HABEAS CORPUS

ENTERED IN CIVIL
DOCKET 10/13/05

INTRODUCTION

Petitioner Damon Cooke was convicted of attempted premeditated murder and sentenced to life in prison with the possibility of parole, plus four years. He filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254 on October 18, 2004. Petitioner contests the state court's denial of his initial habeas corpus petition, which challenged the failure of the California Board of Prison Terms ("the BPT") to find him suitable for parole. For the reasons below, the Court **DENIES** the petition for a writ of habeas corpus.

BACKGROUND

A. Factual Background of Initial Case[1]

Petitioner, a resident of Los Angeles, and his victim, Padraic Ryan, a resident of Berkeley, were partners in a bank fraud operation. In February

[1] This statement of facts is taken from the California Court of Appeal's opinion. *See People v Cooke*, 16 Cal. App. 4th 1361 (1st Dist. 1993).

1991, Ryan and Petitioner visited several Los Angeles banks as part of their plan. Upon Ryan's departure, Petitioner discovered that a $10,000 necklace was missing from his apartment, and he believed Ryan had stolen it. Petitioner, his cousin, and two others drove to Berkeley that night. After searching Ryan's home in vain for the necklace, they waited for Ryan to return to the apartment. During this time, Petitioner's cousin showed them the .38-caliber revolver he possessed. The group discussed the possibility of shooting Ryan.

When Ryan returned, Petitioner accused him of stealing the necklace, which Ryan denied. Petitioner exchanged words with Ryan, and then shot him in the head. Petitioner and the others then left the apartment, and Ryan, who was still alive, called 911.

At his trial, Petitioner testified he did not travel to Berkeley to murder Ryan, but instead traveled there for a concert. He also testified that the attempted murder was not premeditated, and that he only killed Ryan because he was in an agitated mental state. The jury convicted Petitioner on October 2, 1991 of premeditated attempted first degree murder (Cal. Penal Code §§187, 664) and using a firearm (Cal. Penal Code § 12022.5a). Petitioner was sentenced to life imprisonment with the possibility of parole, plus four years for violating Cal. Penal Code § 12022.5a. Petitioner does not challenge his conviction in this proceeding, although he continues to assert that the homicide was not premeditated.

B. Factual Background of the BPT Hearing

On November 19, 2002, the BPT denied Petitioner parole based on the following six factors:

1) that the commitment offense was carried out in an especially cruel and callous manner; 2) that the offense was premeditated; 3) that the offense demonstrated an exceptionally callous disregard for human suffering; 4) Petitioner's favorable psychological evaluation lacked credibility; 5) Petitioner needed further participation in self-help and/or therapy to face, discuss and cope with stress in a non-destructive manner and to face, discuss, and understand the causative factors that led to the life crime; and 6) Petitioner needed to complete a vocation to make him marketable after his release and demonstrate he could set goals for himself. (HD at 111-124.)[2] The BPT accepts as true any findings of the trial court as related to the commitment offense.

A psychological evaluation was administered to Petitioner on February 14, 2000. Although the BPT stated that the evaluation was "favorable," the BPT found that the evaluation lacked credibility because it exhibited a lack of communication between the evaluator and Petitioner, and, therefore, it did not utilize the findings when making its decision. (HD at 112-13.)

However, the BPT did recognize Petitioner's many achievements while in prison. Prior to his hearing date, Petitioner had received 19 laudatory "chronos" (formal recognition for positive achievements while in prison) prior to the hearing

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[2] Exh. B contains the transcript of the Petitioner's hearing and the decision of the BPT. "HT" refers to the hearing transcript. "HD" refers to the transcript containing the decision of the Parole Board. The numbers following "HT" and "HD" refer to the page numbers assigned by Counsel to the Exhibit.

date commending his facilitation of various programs for the institution and for his work performance. During 202, he completed various self-help programs such as Alcoholics Anonymous, a thirteen-week IMPACT workshop, and received self-help chronos for reading and writing reports on self-help books.[3] Petitioner received many positive reports from his supervisors at the various work positions held throughout his sentence, and became an ordained Minister on September 5, 2002. In fact, at the time of the hearing, Petitioner already had post-release plans, including four or five job offers in the information technology field. [4] However, upon weighing the evidence, the BPT concluded that despite Petitioner's positive gains, he was not yet suitable for parole.

C. Procedural Background Relating to Petition

On December 19, 2003, Petitioner filed a petition for a writ of habeas corpus in the Superior Court of California for Alameda County. On December 22, 2003, the Superior Court denied the petition on the grounds that Petitioner failed to "state a prima facie case for relief sought." (*See* Exh. D-1).[5] In its three-sentence denial, the court found "the record ... did not support the Petitioner's claims that his Constitutional and statutory rights were

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[3] He was also commended for participating in self-help programs in 2001.

[4] Petitioner never indicated he planned to return to his former profession as a financial analyst during the hearing.

[5] Unless otherwise indicated, the exhibits ("Exh.") referred to are those submitted with the petition for writ of habeas corpus.

violated by the BPT." (*See* Exh. D-1). The Court also found "that there was some evidence, including but certainly not limited to the life offense, to support the board's denial of Petitioner's parole." (*See* Exh. D-1). No further analysis of the record or various claims was given.

Petitioner subsequently filed a petition for a writ of habeas corpus with the California Court of Appeal on May 3, 2004, which was summarily denied on May 6, 2004. On May 19, 2004, Petitioner filed a petition for review in the California Supreme Court, which was summarily denied on July 28, 2004.

LEGAL STANDARD

The Court may entertain a petition for writ of habeas corpus "on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a); *Rose v. Hodges*, 423 U.S. 19, 21 (1975).

A petition for writ of habeas corpus is reviewed under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *Williams v. Taylor,* 529 U.S. 362, 399 (2000). The AEDPA prohibits a federal district court from granting a petition challenging a state conviction on the basis of a claim that was reviewed on the merits in state court unless the ruling "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "was based on an unreasonable determination of the fats in light of evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Also, a district court must

presume a state court's factual findings are correct. 28 U.S.C.§ 2254(e).

A district court may not grant the writ of habeas corpus simply because the state court erroneously or incorrectly applied clearly established federal law. *Williams*, 529 U.S. at 411. Rather, the state court's "application must also be objectively unreasonable." *Id.* Furthermore, a state court judgment arrived at erroneously should only be overturned if the error had a "substantial and injurious effect or influence in determining the jury's verdict." *Penry v. Johnson*, 532 U.S. 782, 795 (2001).

Where the state court provides no rationale for its conclusion, the state court decision does "not warrant the deference we might usually apply," and the Court may independently review the claims of the petition. *Delgado v. Lewis*, 223 F.3d 976, 982 (9th Cir. 2000) (citing *Delgado v. Lewis*, 168 F.3d 1148, 1152-53 (9th Cir. 1999)). The Court's review is not *de novo*, "but an independent review of the record is required to determine whether the state court clearly erred in its application of controlling federal law. Only by that examination may we determine whether the state court's decision was objectively reasonable." *Delgado*, 223 F.3d at 982 (citation omitted).

ANALYSIS

A. The BPT Satisfied the Due Process Requirements that Petitioner Was Entitled to Under Cal. Penal Code § 3041.

As an initial matter, the Court finds that Petitioner has a cognizable liberty interest in

receiving a parole release date under Cal. Penal Code § 3041(b).[6] Whether the governing state parole statute creates a cognizable liberty interest is determined on a "case by case" basis. *Greenholtz v. Inmates of the Neb. Penal and Corr. Complex*, 442 U.S. 1, 12 (1979). The Ninth Circuit has applied the holding in *Greenholtz* to Cal. Penal Code § 3041(b), and has concluded that the statute "creates in every inmate a cognizable liberty interest in parole which is protected by procedural safeguards of the Due Process Clause."[7] *Biggs v. Terhune*, 334 F.3d 910, 914 (9th Cir. 2003); *see also McQuillion v. Duncan*, 306 F.3d 895, 901 (9th Cir. 2002).[8]

However, even when inmates have a cognizable liberty interest under a state statute, the

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[6] The U.S. Supreme Court has not specifically addressed Cal. Penal Code § 3041(b) in this context. However, circuit decisions can be utilized to "illuminate the meaning and application of Supreme Court precedents" in such instances. *Juan H. Allen*, 408 F.3d 1262, 1275 (9th Cir. 2005).

[7] Cal. Penal Code § 3041(b) states that "the panel or board shall set a release date unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual and that a parole date, therefore, cannot be fixed at this meeting.

[8] Respondent argues that the California Supreme Court rejected a liberty interest in parole in *In Re Dannenberg*, 34 Cal. 4th 106] (2005). The Court disagrees. Nowhere did the *Dannenberg* court hold that § 3041 does not give rise to a liberty interest. Other district courts considering the issue agree. *See Devries v. Schwarzenegger*, 2005 WL 2175875 (E.D. Cal. September 8, 2005); *Hudson v. Kane*, 2005 WL 2035590 (N.D. Cal. August 23, 2005) (following *McQuillion* without reference to *Dannenberg*).

parole boards are still allowed "broad discretion" in their parole-release decisions. *Greenholtz*, 442 U.S. at
13. To satisfy due process, three requirements must be met: 1) the prisoner must be given "an opportunity to be heard;" 2) the parole board must "inform the inmate in what respects he falls short of qualifying;" and 3) some evidence must support the board's decision. *Id.* at 16; *Superintendent v. Hill*, 472 U.S. 445, 456 (1985).[9] The first two procedural factors are not implicated in this case as Petitioner attended a parole review hearing on November 19, 2002 and received the BPT's denial and recommendations that same day.

The factors utilized by the BPT when making suitability determinations for life prisoners are detailed in Cal. Code Regs. tit. 15, § 2402. These factors are "general guidelines" and "the importance attached to any circumstance or combination of circumstances is left to the judgment of the panel," so the Court therefore may not weigh the evidence utilized by the BPT, but instead may only assess whether some evidence supports the BPT's reasons for denial. Cal. Code Regs. tit. 15, § . 2402; *Toussaint v. McCarthy*, 801 F.2d 1080, 1105 (9th Cir. 1986). Factors considered in this analysis include the nature of the offense, the prisoner's plans upon

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[9] Respondent denies that the third "some evidence" requirement, added in *Superintendent*, is applicable in the present case because *Superintendent* involved prison disciplinary proceedings rather than parole review *Superintendent*, 472 U.S. at 455. However, the Ninth Circuit has interpreted the "some evidence" standard to apply in parole release decisions when a prisoner's liberty interest is affected by the board's decision. *Jancsek v. Or. Bd. of Parole*, 833 F.2d 1389, 1390 (9th Cir. 1987).

release, signs of remorse, any criminal record, the prisoner's attitude towards the crime, and any treatment undergone by the prisoner. Cal. Code Regs. tit. 15, § 2402. "Circumstances which taken alone may not firmly establish unsuitability for parole may contribute to a pattern which results in a finding of unsuitability," and "there is no set of facts which, if shown, mandate a decision favorable to the individual." Cal. Code Regs. tit. 15, § 2402; *Greenholtz*, 442 U.S. at 10.

Based on the suitability statute, the BPT stated six reasons for its denial: 1) that the commitment offense was carried out in an especially cruel and callous manner; 2) that the offense was premeditated; 3) that the nature of the offense demonstrated an exceptionally callous disregard for human suffering; 4) that the favorable psychological evaluation of Petitioner lacked credibility (*See* Exh F), 5) that the Petitioner needed more self help and/or therapy to face, discuss, and cope with stress in a non-destructive manner and to face, discuss, and understand the causative factors that led to the life crime; and 6) that Petitioner needed to complete a vocation to make him marketable after his release and demonstrate he could set goals for himself. (HD at 111-124).

The Court finds that there is some evidence in the record to support the BPT's findings that the commitment offense was premeditated. Although Petitioner maintains that the crime was not premeditated, the BPT "accepts as true" the findings of the court. (HT at 5). Here, as the trier of fact found that the evidence showed beyond a reasonable doubt that the murder was premeditated, the BPT had sufficient evidence to deny parole based on this fact. *Cooke*, 16 Cal. App. 4th at 1372.

In addition, the "some evidence" standard is met with respect to the BPT's findings that the commitment offense was especially cruel and callous, and committed with an exceptional disregard for the value of human life. To meet these criteria, Petitioner alleges that there must be "torture and/or mutilation of the victim" and "prolonged suffering." (*See* Petition at 65). However, Petitioner provides no legal support for this contention. Rather, the record shows that Petitioner planned and proceeded to purposely shoot Ryan in the head, a vital organ, which almost surely should have killed him, and then proceeded to leave the apartment without attempting to assist his injured victim. *Cooke*, 16 Cal. App. 4th at 1365. These calculated and uncaring actions indicate that some evidence exists demonstrating the especially cruel and callous nature of the offense, and also show it was committed with an exceptional disregard for human life.

Furthermore, there is some evidence that the psychological evaluation administered on February 14, 2000, lacked credibility, and therefore the BPT was justified in disallowing its favorable conclusions. The BPT's concern with the evaluation centered on the fact that Petitioner's description of the crime during the evaluation was completely inconsistent with his recollection both during the parole hearing and during trial. Cal. Penal Code § 5011b; (HD at 112-13). Therefore, as the BPT based the evaluation's lack of credibility on Petitioner's failure to adhere to his own rendition of the facts, there is some evidence that the BPT was justified in not considering the positive evaluation.

Finally, although Petitioner participated in numerous self-help programs prior to the parole

hearing, there is some evidence that parole could be denied because more extended participation was necessary. Petitioner's participation in self-help programs was limited to only the two years prior to his parole hearing, and the record provides no evidence that his personal gains were permanent at the time of the hearing. Therefore, the Court finds that the brief duration of time Petitioner spent in therapy provides some evidence that petitioner required further self-help before being released on parole.

In sum, after independently reviewing the record, the Court finds that there is some evidence supporting the BPT's denial of parole.

B. The Limited Number of Parole Release Dates Granted by the BPT is Not An Over-Restrictive Interpretation of Cal. Penal Code § 3041.

Petitioner argues that Cal. Penal Code § 3041, which governs parole suitability determinations, is over-restrictive in its application by the BPT, and therefore violates the due process rights of prisoners. The Court disagrees.

The California Supreme Court has held that while Cal. Penal Code § 3041 creates a presumption that a parole release date "shall" be set, the BPT retains the right to deny parole to any prisoner that is considered a threat to society.[10] *Dannenberg*, 34

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[10] When a party challenges a statute as applied, federal courts "are bound by a state's interpretation of its own statute." *Garner v. Louisiana*, 368 U.S. 157, 166 (1961). A federal habeas court cannot alter the state courts' application unless it is unconstitutional, and the Court therefore does not address whether the state courts' application of the statute is "at odds"

(continued...)

Cal. 4th at 1083-84. The California Supreme Court has further emphasized the California legislature's "abiding concern" that the BPT not schedule the release of any prisoner considered to be a continued threat to society. *Id.* at 1088 . Therefore, so long as the BPT bases its denials on valid, individual assessments of each prisoner, it is not in violation of California's parole release statute by denying a vast majority of the prisoners a parole release date, despite any presumption created by the language indicating a parole date should be set.[11] *Id.* at 1094. Accordingly, the large numbers of parole denials cited by Petitioner are insufficient to establish a due process violation. Consequently, as "some evidence" exists to demonstrate that Petitioner still poses a risk to society, the application of Cal. Penal Code § 3041 was consistent with federal Due Process requirements. *Superintendent*, 472 U.S. at 456.

C. As the BPT Utilized a Preponderance of the Evidence Standard When Assessing Petitioner's Parole Suitability, the Court Must Only Demonstrate Some Evidence Supports this Decision to Satisfy Due Process Requirements.

Petitioner alleges that any substantive

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(...continued)
with the state legislature's intent. *Martinez v. California*, 444 U.S. 277, 282-83 (1980).

[11] The California Supreme Court has stated that a "blanket no-parole policy" would violate due process and be inconsistent with Cal. Penal Code § 3041 because no evidence would be necessary for a denial, and prisoners would be unfairly deprived of their liberty. *In Re Rosenkrantz*, 29 Cal. 4th 616, 684 (2002).

decision made by the BPT must be supported by "good cause" and requires that a "preponderance of the evidence" support the decision.[12] Petitioner contends that his due process rights were violated by the BPT because the BPT utilized a "some evidence" standard, and therefore the BPT failed to 'adhere to the mandated burden of proof.

Although Petitioner claims the BPT utilized a "some evidence" standard in making his parole determinations, he cites no evidence supporting this argument.[13] Moreover, in its decision, the BPT stated that Petitioner was not yet suitable for parole because the "positive aspects of his behavior do not yet outweigh the factors of unsuitability." (HD at 114). This language suggests that the BPT applied a "preponderance of the evidence" standard.[14] Consequently, Petitioner's concern that the BPT utilized a "some evidence" standard is unfounded.

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[12] Under Cal. Code Regs. tit. 15, § 2000, "good cause" is defined as "a finding by the board based upon a preponderance of the evidence that there is a factual basis and good reason for the decision made."

[13] Indeed, upon further research, the Court has not found a explicit 'evidentiary standard cited in the BPT regulations that the BPT must adhere to when making parole determinations.

[14] A preponderance of the evidence is defined as "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Black's Law Dictionary (6th ed. 1991).

D. The BPT Did Not Violate Due Process by Considering the Nature of the Commitment Offense.

Petitioner contends the BPT violated his due process rights by finding that the commitment offense was carried out in a especially cruel and callous manner.[15] In *Rosenkrantz*, the court stated that "[i]n some circumstances, a denial of parole based upon the nature of the offense alone might rise to the level of a due process violation - for example, where no circumstances of the offense could be considered more aggravated or violent than the minimum necessary to sustain a conviction, for that offense." 29 Cal. 4th at 683.

Despite Petitioner's assertions to the contrary, the Court finds that some evidence supports the BPT's finding that the nature of Petitioner's commitment offense was especially cruel and callous. Specifically, the evidence demonstrates

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[15] Petitioner, relying upon *In re Ramirez*, 94 Cal. App. 4th 549 (2001), contends that the BPT violated his due process rights by failing to compare the commitment offense with other similar crimes when determining whether it was extremely callous act. Petitioner's argument is without merit. In *Dannenberg*, the California Supreme Court explicitly disapproved of *Ramirez*, and found that "[s]o long as the Board's finding of unsuitability flows from pertinent criteria, and is supported by "some evidence" in the record before the Board, the overriding statutory concern for public safety in the individual case trumps any expectancy the indeterminate life inmate may have in a term of comparative equality with those served by other similar offenders. Section 3041 does not require the Board to schedule such an inmate's release when it reasonably believes the gravity of the commitment offense indicates a continuing danger to the public, simply to ensure that the length of the inmate's confinement will not exceed that of others who committed similar crimes." (internal citation omitted).

that Petitioner waited in the victim's apartment, discussed the possibility of shooting the victim, and later shot the victim in the head. Given Petitioner's premeditated behavior, the Court finds that the BPT properly considered the nature of the offense in denying parole.

CONCLUSION

For the foregoing reasons, the Court DENIES the petition for a writ of habeas corpus.

IT IS SO ORDERED.

DATED: 10/05/2005

***/s/ Martin J. Jenkins***
MARTIN J. JENKINS
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

[Filed 10/06/2005]

DAMON COOKE,

Plaintiff,

vs.

JOSE SOLIS, WARDEN

Defendant. /

No. C 04-04439 MJJ

JUDGMENT IN A CIVIL CASE

() **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

(X) **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS SO ORDERED AND ADJUDGED.

Petition for Writ of Habeas Corpus denied.

DATED: 10/06/2005

Richard W. Wieking, Clerk

By:
***/s/ Monica Tutson***
Monica Tutson, Deputy Clerk

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Date: December 22, 2003 Dept. 009
Fil Cruz, Dep. Clk, Not Reported

| | | |
|---|---|---|
| THE PEOPLE OF THE STATE OF CALIFORNIA<br>Plaintiff | Counsel Appearing for Plaintiff | No Appearance Deputy District Attorney |
| vs. | | |
| DAMON COOKE,<br>Defendant | Counsel appearing for Defendant | |

| | |
|---|---|
| Nature of Prodeedings: EX PARTE PETITION FOR WRIT OF HABEAS CORPUS | Case No. 106516A<br>PFN: AUO444<br>CEN: 1114157 |

The defendant is not present.

The Court having reviewed the defendant's Ex Parte Petition for Writ of Habes Corpus, filed on December 19, 2003, orders said motion be DENIED.

The Petition fails to state a prima facie case for relief sought. The record as submitted by Petitioner does not support the Petitioner's claims that his Constitutional and statutory rights were violated by the BPT. The record indicates that there was some evidence, including but certainly not limited to the life offense, to support the board's denial of Petitioner's parole.

(Rev. 03/03)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FOUR

In re DAMON COOKE,
On Habeas Corpus.

A106321

(Alameda County Super. Ct. No. 106516A)

BY THE COURT:
The petition for writ of habeas corpus is denied.

(Kay, P.J., Reardon, J., and Sepulveda, J., joined in the decision.)

Date: May 08, 2004 KAY, P.J.
P.J.

Court Of Appeal, First Appellate District, Division Four – No. A106321
S124825

IN THE SUPREME COURT OF CALIFORNIA

En Banc

*In re DAMON COOKE,* On Habeas Corpus.

Petition for review DENIED.

Brown, J., was recused and did not participate.

SUPREME COURT
FILED
JUL 28 2004
Frederick K. Ohlrich Clerk
Deputy

GEORGE
Chief Justice

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**
JUNE 04 2010
Molly C. Dwyer, Clerk
U.S. Court of Appeals

| | |
|---|---|
| DAMON COOKE,<br><br>Petitioner - Appellant,<br><br>v.<br><br>JOSE SOLIS, Warden, California Training Facility – Central; et al.,<br><br>Respondents - Appellees. | No. 06-15444<br><br>D.C. No.CV-04-04439 MJJ<br>Norther District of California, San Francisco<br><br>ORDER |

Before: REINHARDT, WARDLAW, and M. SMITH Circuit Judges

Because the parole at issue was denied by the Board over 7 and one-half years ago, and petitioner appealed to this Court over five years ago, we order that the mandate be issued forthwith. Petitions for rehearing/rehearing en banc will be received and treated in the ordinary course.

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**
JUNE 04 2010
Molly C. Dwyer, Clerk
U.S. Court of Appeals

DAMON COOKE,

Petitioner - Appellant,

v.

JOSE SOLIS, Warden, California Training Facility – Central; et al.,

Respondents - Appellees.

No. 06-15444

D.C. No.CV-04-04439 MJJ
U.S. District Court for Northern Califronia, San Francisco

MANDATE

The judgment of this Court, entered June 04, 2010, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

Molly C. Dwyer
Clerk of Court

s/
Theresa Benitez
Deputy Clerk

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**
JULY 19 2010
Molly C. Dwyer, Clerk
U.S. Court of Appeals

| | |
|---|---|
| DAMON COOKE,<br><br>Petitioner - Appellant,<br><br>v.<br><br>JOSE SOLIS, Warden, California Training Facility – Central; et al.,<br><br>Respondents - Appellees. | No. 06-15444<br><br>D.C. No.CV-04-04439MJJ, Norther District of California Oakland<br><br>ORDER |

Before: REINHARDT, WARDLAW, and M. SMITH Circuit Judges

Appellees' emergency motion to recall and stay the mandate is denied.

Appellees' motion does not constitute an "emergency" under this court's rules. The district court ordered the Board of Parole Hearings to "hold a new parole hearing within sixty days" from June 24, 2010. The district court further provided that, if the board finds appellant suitable for release and sets a release date, and the governor does not reverse the board, the district court will stay appellant's actual release for two weeks to allow appellees to request a stay from the district court and, if necessary, from this court. Thus, because appellant will not be eligible for release for at least several months, this

motion was not properly filed as an emergency. *See* 9th Cir. R. 27-3(a) (emergency motion is one in which movant certifies that to avoid irreparable harm relief is needed in less than 21 days.)

SUBSEQUENT PAROLE CONSIDERATION
HEARING
STATE OF CALIFORNIA
BOARD OF PRISON TERMS

| | |
|---|---|
| In the matter of the Life Term Parole consideration Hearing of: | )<br>)CDC Number<br>)H-20151 |
| DAMON COOKE | ) |

CORRECTIONAL TRAINING FACILITY
SOLEDAD, CALIFORNIA
NOVEMBER 19, 2002
8:55 A.M.

PANEL PRESENT:
T. BORDONARO, Presiding Commissioner
G. GARNER-EASTER, Deputy Commissioner
OTHERS PRESENT:
DAMON COOKE, Inmate
MARCIA HURST, Attorney for Inmate
CORRECTIONS TO THE DECISION HAVE BEEN MADE

_____ No
_____ Yes See Errata Sheet

April Allen Capitol Electronic Reporting

CALIFORNIA BOARD OF PRISON TERMS
DEC I S ION

DEPUTY COMMISSIONER GARNER-EASTER: We're back on record.

PRESIDING COMMISSIONER BORDONARO: Thank you. We're back on the record in the case of Mr. Cooke. All those that were previously in the room have returned. The Panel has reviewed all the information received from the public and relied on the following circumstances in concluding that the inmate is not yet suitable for parole and would pose an unreasonable risk of danger to society or athreat to public safety if released from prison. Firstly, the commitment offense was carried out inan especially cruel and callous manner. It was carried out in a premeditated manner. It was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering. These conclusions are drawn from the Statement of Facts wherein the prisoner and several others traveled to the victim's residence. They traveled from Southern California to the San Francisco Bay area where they confronted him about stealing a necklace and cash from the inmate's home. He was apparently confronted on that. He denied the theft and was shot by Mr. Cooke with a 38. He miraculously survived the exit. He was shot in the head with this 38. However, survived the attack. The inmate does not have a previous record. There are no arrests either as a juvenile or as an adult. Institutionally, he has not yet fully participated in beneficial self-help and/or therapy programming. He has not yet developed a marketable skill that can be put to use upon

release. He's had one 128. It was in September of '92 for conduct. He's had two 115s. One in June of '95 for -- Excuse me, possession, trafficking marijuana. This -- And we'll speak further on this 115. It was supposedly dismissed. We'll speak further on that in a moment. He has another 115 in February of, 1993 for disobeying rules and regulations. The psych report dated 2/14/2000 is -- The psych report itself is favorable. But it lacks credibility with myself and with the Panel. There's so many inconsistent and erroneous statements in here, everything from the life crime, the account. I'm not sure if the psychologist and the inmate were really on the same page during this interview. Again, there's no flags in here about any type of mental disorder for the inmate. And that's a positive thing. So it's not necessarily that it's an unfavorable report. But we're going to ask for another report to be done to make sure some of these inconsistencies with not only the record and the psych report and with what the inmate's told us today, make sure that those inconsistencies are worked out between the clinician and the inmate. We'll ask for another psychological report to be performed. So I would say that it simply lacks credibility with the Panel. His parole plans are intact. He has viable residential plans in the last county of legal residence. He has actually quite a few offers from a large network of support, family, and friends. He also has job offers that are on file. 3042 notices were sent out. There were no responses in opposition. We did have a letter from his attorney at the time of the trial that was in favor of his release, and the correctional counselor writes the inmate would pose a low degree of threat if

released to the public. The Panel does make the following findings, that the prisoner does need self-help and/or therapy programming in order to face, discuss, understand, and cope with stress in a nondestructive manner. And to face, discuss, understand the causative factors that led to the life crime. Until progress is made, he continues. to be unpredictable and a threat to others. He should be commended for he's taking college courses. He's got very good work reports, exceptional work reports. Does a great job in his work assignments. He's been involved with self-study, reading different types of books in the therapy areas, and he's been involved with volunteer work here at the institution .in the Children's Holiday Festival. He started a lifers program. He should be commended for those activities. However, these positive aspects of his behavior -- And I also should mention that he hasn't had a 115 since 1995, which is the one that is in question. And prior to that, it was 1993. However, these positive aspects of his behavior do not yet outweigh the factors of unsuitability. In a separate decision, the Hearing Panel finds that it's not reasonable to expect that parole would be granted at a hearing during the next two years. This is a two-year denial, and the reasons are as follows: Firstly, the commitment offense was carried out in an especially cruel manner. Specifically, he shot Mr. Padraic Ryan. Mr. Ryan survived this attack, apparently after being accused of stealing from the inmate. The inmate and others traveled to Mr. Ryan's home from Southern California to Northern California. Mr. Ryan's cousin had a gun. Apparently, -- excuse me. Mr. Cooke's cousin had a gun with him. Mr.

Cooke apparently took the gun and shot Mr. Ryan in the head. Mr. Ryan survived that attack. He feigned his death until the inmate and the others left the scene before he was able to call 911. And the inmate and others were arrested shortly thereafter. The offense was carried out in a manner which demonstrated an exceptionally callous disregard for human suffering. It does appear that it was also a calculated -- that it was committed in a calculated manner. He does have two 115s. One in '93 for disobeying the rules and regs, and one in '95 for position and trafficking of marijuana. And the prisoner has not completed necessary programming which is essential to his adjustment and needs time to gain that programming. He needs to complete a vocation, and he needs to participate more fully in self-help and therapy programming. Because of these reasons a longer period of observation and evaluation of the prisoner is required before the Board shall find the prisoner suitable for parole. The Panel recommends that the prisoner remain -- become then remain disciplinary-free, if it's available to him to upgrade vocationally, also if it's available to him to participate in self-help programming, and if any therapy programming were to become available, to participate in that also, and to cooperate with clinicians in the completion of a new clinical evaluation. That does conclude the reading of the decision. Commissioner Garner-Easter, any comments?

DEPUTY COMMISSIONER GARNER-EASTER: I have none. Thank you.

PRESIDING COMMISSIONER BORDONARO: We are going to -- except for the 115 we mentioned, we are going to ask for some sort of --

we're going to ask for an investigation to clear this up. And you might be able to explain that a little bit better because you've seen the documents.

DEPUTY COMMISSIONER GARNER-EASTER: One of the concerns I have is I've researched the file, and I just don't see that it was exonerated. And I've also researched your information that you presented in this -- in 2002. And I have a third level appeal by the department at the director's level saying that the order was to stand as written. So we're trying to figure out what's going on here. You don't -- We can't -- We don't see it. I looked two or three times. I may have missed it. But we're going to ask for a formal investigation to clear up that CDC IIS, so, in fact, if -- And I do have it. I do see your copy. So that if, in fact, it was dismissed, both these 115s should be removed from your file. I'm also puzzled by the fact why an institution--how watch commander can have the authority to override the director's level, which is the third level of appeal. I just don't get it. So there's either more to the story or something we're just not seeing. So we're going to ask them to clear that up for the next hearing so it will be available.

PRESIDING COMMISSIONER BORDONARO: And we're also going to ask that -- Oh, go ahead on that subject.

ATTORNEY HURST: Yeah, I do want to restate for the record, however, that this was discussed with his counselor, and at the time his counselor agreed that the 115 should be pulled. He didn't dispute the document or the authority therein. know. So--

DEPUTY COMMISSIONER GARNER-EASTER: Okay.

ATTORNEY HURST: And he said, I'll take care of that before the hearing.

DEPUTY COMMISSIONER GARNER-EASTER: And he didn't.

ATTORNEY HURST: And under ordinary circumstances, if I see a 115 in there that I feel should have been dismissed, I would have asked for a postponement.

DEPUTY COMMISSIONER GARNER-EASTER: Yes.

ATTORNEY HURST: But I thought this would explain the circumstances.

DEPUTY COMMISSIONER GARNER-EASTER: Yeah.

ATTORNEY HURST: And I also know that there were -- there was a previous postponement in order to clear up a disciplinary matter. So I knew that the Board would be aware there had been something. But certainly, you know, not that –

PRESIDING COMMISSIONER BORDONARO: (Inaudible) .

ATTORNEY HURST: -- you'd be considering it.

PRESIDING COMMISSIONER BORDONARO: Well, we've never seen And I've never seen -- I'm not -- I don't have the history CDC, but I never seen a watch commander able to override a director's appeal. I don't even know the process of that. I don't know the mechanism of that. I have never heard of that where a watch commander can override the director's appeal when specifically on a director's appeal says this exhausts all administrative remedies. Usually the next step is court. So we need to get those two tied together. How it went from a director's appeal that says no more administrative remedies, and then we've got

this other document. We're not disputing the document either. But we don't have the nexus between two.

ATTORNEY HURST: Well, I don't know the –

PRESIDING COMMISSIONER BORDONARO: How do we go from one to the other. We don't – not any mechanism to allow for that to happen. aware of So just even the question of process, there's something that should be in between that ties those two together.

ATTORNEY HURST: Okay.

PRESIDING COMMISSIONER BORDONARO: Maybe there was some sort of a special investigation.

But there's nothing that ties them.

ATTORNEY HURST: But-

PRESIDING COMMISSIONER BORDONARO: We just have this other document. See what I'm saying?

ATTORNEY HURST: I understand.

PRESIDING COMMISSIONER BORDONARO: There's no bridge between the two.

ATTORNEY HURST: I understand. I just want to make it clear that it appeared to me that the counselor understood'what should be done and was going to do it.

DEPUTY COMMISSIONER GARNER-EASTER: Yeah. And we did – It is on record that you said it. And we've worked with you enough to know how you work and that you do represent your client always in the best interest. I'm just puzzled why the counselor just didn't take it out then.

PRESIDING COMMISSIONER BORDONARO: Well, they may have the same questions that we have

DEPUTY COMMISSIONER GARNER-

EASTER: So it just needs to say –

PRESIDING COMMISSIONER BORDONARO: And where are the bridges between the two as far as a process is concerned. We're also going to ask that police reports and autopsy reports are placed in the C-File so we can clear up any of those issues aboutthe commitment offense that might be in here, bullet trajectory, those type of things, because that might help with your version of the offense. Give a little more weight to you. The autopsy should clarify, you know, exactly what happened, the distance, and all those kind of things. There's so many inconsistencies in your file, it's very difficult, I tell you, to figure out what happened. So hopefully that will give some more information to the Panel. And did you appeal this case?

INMATE COOKE: Yes sir, I did.

PRESIDING COMMISSIONER BORDONARO: We've also asked for them to track down the Appellate Decision to get in your C-File because that usually has the best Statement of Facts Instead of relying on the Probation Officers report, police reports. I mean those things are not adjudicated. The Appellate Decision is. So hopefully that will help maybe clear up some of those outsta~ding issues for you too. With that then I I want to wish you good luck. We'll adjourn the hearing at 11:10. Good luck.

INMATE COOKE: Can I say one more thing? I just thought about something.

PRESIDING COMMISSIONER BORDONARO: Are we still on the record?

DEPUTY COMMISSIONER GARNER-EASTER: Uh-hmm.

PRESIDING COMMISSIONER

BORDONARO: Go ahead.

INMATE COOKE: I have a question about what exactly it is that you would like me to do in order to be found suitable.

PRESIDING COMMISSIONER BORDONARO: Well we gave you -- I gave you what my recommendations were free. You need to become then remain disciplinary free. I believe you need to upgrade vocationally. Get a vocation under your belt. And you know, think about it this way, we can only recommend aparole grant here at this hearing. Then what leaves here is this file and your C-File, and it goes up to Decision Review, and goes on to the Governor. A lot of people take a look at it. They look at certain areas. Obviously the crime you can never change. So that's out of your control. But everything else is under your control. We look at vocation. We look at education, which you've done fine on. We look at disciplinaries. We look at self-help. All right. And we look at psych reports, which basically if you do all those other things, you're psych report, you know, which I think are going to be fine. So take care of all those things. Get them done. Get the paperwork in here. Because everyone likes to see certificates and a completion in a vocation and,you know, any self-help areas. That way -- Then if you get a parole -- if your parole is denied, it's on us, not on you. But don't give the Governor and the Board a reason to deny your parole. We want to make sure that -- You know. You've got job offers in here. And I'm not saying you don't have skills. But it's very good to get a vocation because it not only shows that you -- It shows that you can grow as a person. It shows that.you can set goals and

complete goals and get something done. So if you've got the financial resources, which it sounds like you do, you're working right now without a pay number, I'd get a vocation. Get into something that's challenging. Get yourself some job skills. You know. They've got database programming, and they've got some -- You know. They've got drafting, computer assisted drafting. I mean there's some vocations out there that are not just, you know, shoe repair or underwater basket weaving. You know what I'm saying? I mean there's some things that show that you can take a challenge, and that you can complete it. Set your goals, and get something done, make yourself a better candidate for parole. So those are the areas that we look at. And just start setting them up and knocking them down.

DEPUTY COMMISSIONER GARNER-EASTER: And the other thing that I would have a concern is you are very bright. You were bright when you came in. You continue to display high aptitude. You are -- You have an interest in business and finance and is how with a felony on your record and being released as a felon, how iealistic would it be for you to get a job back in the financial realm.

INMATE COOKE: Well, I wrote the SEC, and they told me that it's a question of moral turpitude. So in that light, that's why I've geared towards computers.

DEPUTY COMMISSIONER GARNER-EASTER: Okay.

INMATE COOKE: Simply because I don't need to deal, interact (inaudible).

DEPUTY COMMISSIONER GARNER-EASTER: Okay.

PRESIDING COMMISSIONER BORDONARO: Right. And there a Not just

computer repair. But there's -- Not maybe at this institution. But there's others that have some pretty good computer vocation that would really help you to knock that down and give you the skills for that. So those are my recommendations

INMATE COOKE: Okay.

PRESIDING COMMISSIONER BORDONARO: All right?

DEPUTY COMMISSIONER GARNER-EASTER: Sir, good luck to you.

PRESIDING COMMISSIONER BORDONARO: Good luck.

INMATE COOKE: Thank you.

--oOo--

PAROLE DENIED TWO YEARS

EFFECTIVE DATE OF THIS DECISION Mar. 12, 2003

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

DAMON COOKE,

Petitioner,

vs.

JOSE SOLIS, Warden, California Training Facility-Central; et. al.,

Respondents. /

[Filed 06/24/10]
No. C 04-04439 CW

ORDER GRANTING AMY F. MORTON'S MOTION TO WITHDRAW AS COUNSEL, PETITIONER'S MOTION FOR SUBSTITUTION AND APPOINTMENT OF COUNSEL AND PETITION FOR WRIT OF HABEAS CORPUS (Docket No. 37)

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On October 18, 2004 Petitioner Damon Cooke filed a petition in this district for a writ for habeas corpus concerning the California Board of Prison Terms's [16] November, 2002 decision to deny him Parole. His petition was assigned to the Honorable Martin J. Jenkins and was denied. He timely appealed to the Ninth Circuit Court of Appeals. On June 4, 2010, the Ninth Circuit reversed the decision of the district court, concluding that the "Parole Board's findings were individually and in toto unreasonable because they were without evidentiary support," and remanded with instructions to grant the writ. Cooke v. Solis, ____ F.3d ____, 2010 WL 2330283,at *9 (9th Cir.). The mandate of the ninth Circuit issued the same day. Following remand,

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[16] On July 1, 2005, the California Board of Parole Hearings (BPH) replaced the Board of Prison Terms. Cal. Pen. Code § 5075(a).

Petitioner's case was reassigned to the undersigned because Judge Jenkins no longer sits on this court.

Amy F. Morton, Petitioner's attorney of record, now moves for leave to withdraw as counsel. She represents that Petitioner does not oppose her request and that he asks that Michael Satris be appointed in her place pursuant to the Criminal Justice Act (CJA).

Assuming that counsel's representations are correct, the Court GRANTS the motion. (Docket No. 37) Mr. Satris is already familiar with the facts of the ase, having argued Petitioner's appeal before the Ninth Circuit. The Clerk shall amend the docket to reflect Ms. Morton's withdrawal and the substitution and appointment of Mr. Satris under the CJA to represent Petitioner on the above-entitled federal habeas petition. Counsel should seek remimbursement purusant to the 18 U.S.C. § 3006A(d) and (e) via the Federal Public Defender's Office.

In accordance with the Ninth Circuit's mandate, Petitioner's petition for a writ of habeas corpus is GRANTED. The Board of Parole Hearings shall hold a new parole hearing within sixty days from the date of this Order and reevaluate Petitioner's suitability for parole in accordance with the Nin Circuit's decision. If the Baord finds Petitioner suitable for parole and sets a release date and the Governor does not reverse, the Court will stay Petitioner's actual release for two weeks to allow Respondent's to request a stay pending appeal from this Court and, if necessary, from the Court of Appeals. The Court retains jurisdiction to review compliance with its Order and with the Ninth Circuit's mandate. Mr. Satris's appointment cannot encompass representation before the Board, but only any efforts

necessary to obtain compliance with the courts' orders.

IT IS SO ORDERED.

DATED: June 24, 2010

*/s/ Claudia Wilken*
CLAUDIA WILKEN
United States District Judge

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**

JUNE 18 2010

Molly C. Dwyer, Clerk
U.S. Court of Appeals

ELIJAH CLAY,

Petitioner - Appellee,

v.

A.P. KANE,

Respondent - Appellant

No. 07-55377

D.C.No.CV-04-08663-VAP

MEMORANDUM*

Appeal from the United States District Court
For the Central District of California
Virginia A. Phillips, District Judge, Presiding

Argued and Submitted February 7, 2008
Submission Vacated and Deferred April 18, 2008**

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

** After oral argument, we vacated and deferred submission of this case pending decision of the California Supreme Court in two cases, *In re Lawrence*, 190 P.3d 535 (Cal. 2008) and *In re Shaputis*, 190 P.3d 573 (Cal. 2008), and awaited

(continued...)

Resubmitted June 18, 2010
Pasadena, California

Before: PREGERSON and WARDLAW, Circuit Judges, and LEIGHTON***, District Judge.

The California Board of Prison Terms ("Board")[17] found state prisoner Elijah Clay suitable for parole. Then-Governor Gray Davis reversed the Board's decision. Clay petitioned the California state courts for a writ of habeas corpus challenging the Governor's decision. The Los Angeles Superior Court, the Court of Appeals, and the California Supreme Court all denied the petition in turn. Clay then filed a petition for writ of habeas corpus in federal court. The district court granted the writ and the state now appeals that decision. **WE AFFIRM**.

The Board found that Clay would not pose an unreasonable risk of danger to society or a threat to public safety if released from prison, noting that a prison psychologist found that "his violence potential is considered to be no more than, that of the average citizen in the community." It also found that Clay showed remorse and took responsibility for the death of the victim. The Board also favorably noted Clay's extensive participation in educational and therapeutic programs while in prison. The Board granted parole subject to review by the Governor.

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(...continued)
this Court's en banc decision in *Hayward v. Marshall*, 603 F.3d 546 (9th Cir. 2010) (en banc).

*** The Honorable Ronald B. Leighton, United States District Judge for the Western District of Washington, sitting by designation.

[17] On July 1, 2005, California created the Board of Parole Hearings to replace the Board of Prison Terms. Cal. Penal Code § 5075(a).

*See* Cal. Const. art. V, § 8(b); Cal. Penal Code § 3041.2(a).

In reversing the Board's decision, the Governor relied on four main factors. First, he found that "the gravity of Mr. Clay's crime is alone, sufficient to conclude that he is not suitable for release at this time." Second, he noted that "Mr. Clay has not sufficiently participated in self-help in order to further delve into the causative factors for his participation in the life crime" and "that until further progress is made, Mr. Clay continues to be unpredictable and a threat to others." [*Id.*] Third, he criticized the Board for giving "inadequate consideration to Mr. Clay's extensive criminal history." [*Id.*] Finally, he said that Clay's parole plans, specifically the fact that he "has a job offer in San Diego, yet his offer of housing is in Los Angeles" - were unrealistic. [*Id.*]

The Los Angeles County Superior Court denied Clay's habeas petition, concluding that the Governor's findings were supported by "some evidence" and the Court of Appeal and California Supreme Court summarily denied the petition.

As a matter of California state law, "some evidence" of future dangerousness is essential for denial of parole. *Hayward v. Marshall*, 603 F.3d at 562 (citing *In re Lawrence*, 190 P.3d 535, 549 (Cal. 2008) and *In re Shaputis*, 190 P.3d 573, 582 (Cal. 2008)).

If the Governor relies on the aggravated nature of the commitment offense to deny parole, as he did here, he may do so only if "the record also establishes that something in the prisoner's pre- or post-incarceration history, or his or her current demeanor and mental state" related to the commitment offense is "probative ... of a continuing threat to public safety." *In re Lawrence*, 190 P.3d at

555. Here, there is no evidence in the record that would indicate that Clay poses a danger to the community if released. He committed the offense while in his twenties in 1976 and in 1978 was sentenced to a term of seven years to life. Clay is now over sixty years old. Clay's criminal history is unremarkable, consists mostly of misdemeanor offenses and theft crimes, and is over forty years old. He has not received any disciplinary infractions in prison since 1990. Prison psychiatrists and psychologists unanimously found Clay suitable for parole.

The remaining factors relied on by the Governor - Clay's alleged need for participation in even more therapeutic programming and the "unrealistic" nature of his parole plans - are also plainly contradicted by the record. Clay has participated extensively in therapeutic and educational programming, and the prison psychologist found that Clay presented no more of a threat to the public than the average citizen. Further, Clay has secured a job and housing in Southern California and has developed his marketable skills while incarcerated. The Los Angeles County Superior Court's decision denying Clay's petition for a writ of habeas corpus upholding the Governor's decision was an unreasonable application of California's "some evidence" rule and was an unreasonable determination of the facts in light of the evidence presented. *Hayward*, 603 F.3d at 562-63; 28 U.S.C. § 2254(d)(1) and (2).

The district court's grant of the writ is **AFFIRMED.**

Filed
Clerk, U.S. District Court
**Jan 20 2006**
Central District of California
By Deputy

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

| | | |
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| ELIJAH CLAY, Petitioner, | ) | Case No. CV 04-8663 VAP(AJW) |
| v. | ) | REPORT AND RECOMMENDATION OF MAGISTRATE JUDGE |
| A.P. KANE Warden ) Respondent. | ) | |

Petitioner has been incarcerated for almost thirty years, serving a sentence of seven years to life for murder. Petitioner has never committed a violent act in prison, and has had a discipline-free record for more than a dozen years. He has earned a general equivalency diploma, obtained a vocational electronics certificate, participated successfully in numerous self-help therapy programs, and received glowing recommendations from prison psychiatrists and correctional counselors. Petitioner has accepted responsibility for his crime, and his expressions of remorse have been found to be sincere. Experts have determined that he is no more dangerous than the average citizen in the community. Not surprisingly, after painstaking consideration, the Board of Prison Terms concluded that petitioner did not pose an

unreasonable risk of danger to society or a threat to public safety, and that he was suitable for parole. Former Governor Davis, however, reversed that finding. Petitioner then filed this federal habeas corpus petition, alleging that former Governor Davis's decision violated due process. Although former Governor Davis's decision may have been well-intentioned, it fails to satisfy even the forgiving "some evidence" test for constitutionality prescribed by the Supreme Court. Consequently, the petition should be granted.

BACKGROUND

In 1978, petitioner was convicted of one count of first degree murder and one count of first degree robbery. [Respondent's Exhibits ("Resp. Ex.H") 1-2]. He was sentenced to state prison for a term of seven years to life on the murder count, and a concurrent term of five years for the robbery. [Resp. Ex. 2].

Petitioner received his first parole suitability hearing on July 28, 1981 before the Board of Prison Terms ("BPT"), and was found unsuitable for parole. He subsequently received fourteen additional parole suitability hearings. [Resp. Ex. 6]. The first thirteen of those hearings resulted in determinations that petitioner was unsuitable for parole. Petitioner's fifteenth parole suitability hearing was held on February 26, 2003.

The BPT began the February 26, 2003 hearing by reciting the facts surrounding the commitment offense, which are as follows:

On March 10, 1976, Shirley Pine arrived home with. Mr. Jevremovic and introduced him to her boyfriend, Learman Clay, his brother Elijah Clay, and Sharon Grant. Mr. Jevremovic, whom Shirley had met ten minutes earlier, then sat on the couch

next to Sharon and offered her a beer. Shirley went into another room with the Clay brothers. When they returned, Shirley told Sharon to move off the couch. Elijah Clay put a gun into Mr. Jevremovic's side and told his brother Learman to go into his pockets. Mr. Jevremovic hit Learman and knocked him into the wall. Learman picked up a knife from the table and stabbed Mr. Jevremovic in the side. The brothers then dragged Mr. Jevremovic into the bedroom and started beating him with the gun. When Sharon tried to stop them, Learman gave the knife to Shirley. Shirley put the knife against Sharon's side and made her return to the den.

Elijah sent Shirley to bring Mr. Jevremovic's car into the alley. Mr. Clay and his brother carried Mr. Jevremovic to his car. Shirley opened the trunk and the brothers placed Mr. Jevremovic into the trunk with his hands and feet tied together. Mr. Clay drove Mr. Jevremovic's car and [sic] while the others followed in another car. Mr. Clay abandoned Mr. Jevremovic's car, got into the car with the others and returned to Shirley's house.

On March 29, 1979, the police were summoned to the scene of a parked car. The strong odor of a dead body permeated the air. A portion of the car near the license plate was charred. A body, later identified as Mr. Jevremovic, was discovered with the hands tied with an extension cord and the feet tied with wire. The body had a 5 inch deep stab wound to the right upper abdomen, three puncture wounds in the left shoulder, three fractured ribs, a fractured skull and several abrasions on the head.
[Resp. Ex. 3 at 6-14; Resp. Ex. 4].[18]

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[18] The foregoing recitation of the offense is taken from former Governor Davis's decision reviewing the BPT's grant of (continued...)

The BPT found that petitioner took responsibility for his part in the murder. Petitioner acknowledged that he had been a "willing participant" in the crime, said that he was bothered by his failure to stop the crime, and admitted that he believed that it had been a "senseless crime." [Resp. Ex. 3 at 13]. Petitioner also conceded that his criminal history included a juvenile vehicle theft, and two vehicle thefts as an adult. [Resp. Ex. 3 at 14-15]. In addition, petitioner admitted that he had violated probation on the juvenile commitment. [Resp. Ex. 3 at 14]. Petitioner acknowledged having been arrested for assault with a deadly weapon, burglary, grand theft auto, and "numerous" robberies, and having received summary probation on several occasions. [Resp. Ex. 3 at 14-15].

Petitioner explained his plans if paroled. He was to live in Los Angeles with Katherine Bell, a licensed vocational nurse who worked at Santa Monica UCLA Medical Center. Ms. Bell indicated that she was willing to help petitioner financially and to provide him with a place to live. [Resp. Ex. 3 at 17-20]. Petitioner had received an offer of employment from Proco Maintenance in La Mesa, California.- [Resp. Ex. 3 at 17-20). When asked about the long commute between San Diego and Los Angeles, petitioner stated that he was attempting to get a local job offer from Good Will Industries, but that he was willing to take whatever job offer he could get. [Resp. Ex. 3 at 20-21]. Petitioner further explained that he intended to pursue employment with the Good Will Industries reentry program, as that was his preference, but that

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(...continued)
parole, in which Governor Davis relies upon the statement by the California Court of Appeal. [Resp. Ex. 4]. The parties do not dispute the accuracy of this summary.

in the meantime, he would accept the job offer that had been made. [Resp. Ex. 3 at 20-21].

Petitioner also presented letters of support from three of his sisters. One of petitioner's sisters (who was not named in the transcript) offered to provide a residence for petitioner in Los Angeles. [Resp. Ex. 3 at 23]. Petitioner's sister Marbell offered to assist petitioner by helping him "adjust" to life outside prison, as well as with "clothes and things like that." [Resp. Ex. 3 at 23-24]. Petitioner's sister Crissey offered to house petitioner in Spring Valley. [Resp. Ex. 3 at 24-25).

The BPT then reviewed petitioner's performance in prison since his last parole hearing one year earlier. Petitioner had completed a "very rigorous" 13 week Impact Workshop, in which petitioner gained insight and empathy for the victims of his crime. [Resp. Ex. 3 at 26- Petitioner also received a laudatory "chrono" from Dr. Fishback, which acknowledged petitioner's participation in a "lifer's group" for over nine months. Dr. Fishback said:

Clay now has a level of dangerousness at or below the minimum level appropriate for release. He is well prepared at this time to fully discuss with the Board Members each and all of the above issues [namely, understanding his crime at a deep level, understanding impulse control, and risk factors]. And it encompasses a lot of early maladjustment, exposure to destabilization, lack of personal support.

[Resp. Ex. 3 at 27-28]. In addition petitioner completed the Arts in Corrections Creative Writing journalism class, the Muslim Development Center's Anger Management course, and an HIV/AIDS course. [Resp. Ex. 3 at 28]. Petitioner previously had earned a vocational electronics certificate and, in 1997, he obtained a GED. [Resp. Ex. 3 at 29-32]. Petitioner

had received several disciplinary chronos, all of them for failure to report to a job assignment, the last of which was issued in 1990, more than a dozen years before the hearing. He had never been disciplined for any violent behavior. [Resp. Ex. 3 at 32].

The BPT considered a recommendation from petitioner's correctional counselor, which stated: Considering the commitment offense, prior record and prison adjustment, this writer believes that the prisoner would probably pose a low degree of threat to the public at this time. Clay has programmed in an extremely compliant manner. He has been disciplinary free since 1984, and has kept himself occupied in positive pursuits, which served to develop his maturing character, enhanced his readiness for successful parole and reintegration into society. He assumes full responsibility for his actions involved in this tragic offense and expresses his most sincere remorse for the victim and his family. Although he realizes it was his intention not to kill the victim, it's no consolation to the great consequences brought from the fateful incident (inaudible) are a constant source of internal pain throughout his life. He cannot change what transpired, but he used - he is in sincere hope that one day he will be considered having paid the unending personal debt and be allowed to resume what life [he] may have left upon release. [Resp. Ex. 3 at 33-34].

The BPT noted that petitioner's latest psychological report stated that petitioner' s "previous diagnosis includes alcohol abuse in institutional remission. Secanol abuse in institutional remission and anti-social personality disorder improved." [Resp. Ex. 3 at 34]. The report noted that petitioner never met the criteria for "inclusion into the mental health delivery

population." [Resp. Ex. 3 at 34]. The clinical assessment found that petitioner's current level of insight and judgment, in general, and specifically regarding his commitment offense is good and supports a positive prediction of successful adaption to community living. He appears to have profited well from his self-help groups." [Resp. Ex. 3 at 35].

With regard to the assessment of petitioner's dangerousness, the evidence showed that petitioner's "risk for violent behavior within the controlled setting is considered to be significantly below average relative to this level two inmate population." In addition, the report stated that petitioner has not received either a 115 or 128 disciplinary for the last 12 years. Significantly, he has never received a CDC 115 for violence. During the clinical interview the inmate' was administered the assessment measure for prediction of future violence, and the obtained measure, indicated a minimal risk for violence in either the controlled institutional setting or in the community setting. In light of the foregoing factors, if released to the community, his violence potential is considered to be no more than that of the average citizen in the community. Notably, this is the lowest level of predicted risk for violence which can reasonably be clinically provided. [Resp. Ex. 3 at 36].

After considering this evidence, the panel returned with a tie vote. Presiding Commissioner Lawin found that petitioner did not pose an unreasonable risk of danger to society or a threat to public safety and was suitable for parole. [Resp. Ex. 3 at 45-47]. Commissioner Lawin explained her decision as follows:

> The prisoner has enhanced his ability to function within the law upon release through participation in education programs. He acquired

his GED and then took the test again, passing once again. Through self-help and therapy programs, most recently, the Impact Workshop, lifer's group, Arts in Corrections, Anger Management, and through vocational programs. He has completed voc[ational] electronics. He - because of maturation, growth, greater understanding and age, has a reduced probability of recidivism. He has realistic parole plans, which include a job offer and family support. He has maintained positive institutional behavior, which indicates significant improvement in self -control. . Has not had a 115 in nearly 13 years. And he show's signs of remorse. [Resp. Ex. 3 at 46]. Commissioner Lawin then noted that the psychiatric reports of Dr. Reed and Dr. Terrini both supported release, opining that petitioner had the lowest possible predicted risk for violence. [Resp. Ex. 3 at 46-47].

Deputy Commissioner Lopez found that petitioner would pose an unreasonable risk of danger to society or a threat to public safety if released from prison. Commissioner Lopez's decision was based upon the facts of petitioner's commitment offense, which demonstrated "a disregard for the life and suffering of another." [Resp. Ex. 3 at 50-51]. In addition, Commissioner Lopez considered petitioner's prior criminal history, which she described as "lengthy." [Resp. Ex. 3.at 51]. Finally, Commissioner Lopez explained that petitioner "has not sufficiently participated in beneficial self-help programs," and needed to do so in order to "delve into the causative factors for his participation in the life crime." [Resp. Ex. 3 at 51]. When asked for more specificity with regard to her reasons for denying

parole suitability, Commissioner Lopez responded:
Well, [petitioner]'s doing a lot this last period to upgrade all his like self-help therapy, and it's just been shown during - for a short period of time. If we see - If I see a little bit more, then I think, you know what, Mr. Clay, you're the best I've seen to be honest with you.
[Resp. Ex. 5 at 52-53]. Commissioner Lopez then conceded that petitioner's commitment offense had "played a big role in her decision." [Resp. Ex. 3 at 53].

After an en banc review by the BPT, petitioner was found suitable for parole. [Resp. Ex. 3; Petitioner's Ex. B].

On September 30, 2003, former Governor Gray Davis exercised his constitutional power of parole review, and reversed the BPT's decision. [Resp. Ex. 4). Former Governor Davis began the explanation of his decision by reciting the facts surrounding the commitment offense. [Resp. Ex. 4]. Former Governor Davis then described the background of the decision he was reviewing, and explained his reasons for reversing that decision:

On February 26, 2003, a panel held a suitability hearing for Mr. Clay. The hearing ended in a tie vote. Mr. Clay's case was then referred to the Board of Prison Terms, sitting en banc. The Board, by majority vote, found Mr. Clay suitable for parole. The Board found that Mr. Clay would not pose an unreasonable risk of danger to society or a threat to public safety if released from prison. They found Mr. Clay has enhanced his ability to function within the law upon release through participation in educational programs, self-help and therapy programs, and through vocational programs. They also found there was a reduced probability of recidivism because of his maturation, growth,

greater understanding and age and that Mr. Clay has maintained positive institutional behavior and that he shows signs of remorse. Finally, they found that Mr. Clay's psychiatric reports support release.

I agree that Mr. Clay has made commendable progress while in prison. He completed his GED and received a certificate of completion in electronics. He has participated in Alcoholics Anonymous, the IMPACT Workshop, Lifer Group, Muslim Development Center's Anger Management, Millati Islami Path to Recovery Addiction Program, Lifeskills Group, Success Tools of the Masters, and hepatitis, tuberculosis and HIV/AIDs training. Mr. Clay has also received several laudatories for his assistance and performance during critical periods, his attitude, and his work with staff and others. These are all positive factors lending support to a finding of suitability for parole for Mr. Clay. I have, however, considered all of the factors for suitability and unsuitability under California Code of Regulations, Title 15, section 2402 and believe that the positive factors are outweighed by each of several negative factors demonstrating Mr. Clay's unsuitability for parole at this time.

The crime was committed in an especially heinous and atrocious manner. It was clear that after Shirely [sic] brought Mr. Jevremovic home, a plan was hatched to rob him. Sharon was told to move off the couch to allow his brother complete access to Mr. Jevremovic. Mr. Clay stuck a gun in Mr. Jevremovic's side and told his brother to go through Mr. Jevremovic's pockets. When Mr. Jevremovic fought back, he was stabbed by Mr. Clay's brother. As he continued to fight, he was beaten with the gun. Mr. Clay and his brother then tied Mr. Jevremovic's hands behinds him and tied his feet together and

stuffed him into the trunk of his car. Mr. Clay drove off and parked Mr. Jevremovic's car and left him in the trunk to die. Later, Mr. Clay's brother set the car on fire with Mr. Jevremovic still inside the trunk. These actions demonstrate an exceptionally callous disregard for human life.

Mr. Clay also took pains to avoid detection. He drove the car and parked it [in] another location to avoid any trails suggesting it was he that committed the crime. The car was set on fire to eliminate any potential fingerprints. I find that the gravity of Mr. Clay's crime is alone, sufficient to conclude that he is not suitable for release at this time.

Mr. Clay had a long history of prior criminal actions - including numerous robberies, which included a prior prison term, commitment to the Youth Authority, probation and county jail. Further, as noted by the deputy commissioner on the panel, Mr. Clay has not sufficiently participated in beneficial self -help programs and needs continued participation in self-help in order to further delve into the causative factors for his participation in the life crime. The dissenting deputy commissioner found - and I agree - that until further progress is made, Mr. Clay continues to be unpredictable and a. threat to others. The deputy commissioner also recommended that during the next year, Mr. Clay should remain disciplinary free and participate in whatever self-help becomes available. The recent gains Mr. Clay has made are commendable, but the gains need to be shown over a sustained period of time.

I also believe the Board gave inadequate consideration to Mr. Clay's extensive prior criminal history. The robbery is not an isolated incident, but the culmination of a life of crime that escalated in

severity and violence. Mr. Clay has two convictions for theft, one for resisting arrest, two for burglary, and then the instant murder. Mr. Clay has clearly failed numerous attempts to correct his criminal behavior. His demonstrated inability to remain crime-free in an uncontrolled setting causes me concern and demonstrates that he is not suitable for release at this time.

Finally, I agree with the observations of the Deputy District Attorney appearing at the hearing the Mr. Clay's parole plans are unrealistic.. He has a job offer in San Diego, yet his offer of housing is in Los Angeles - and he is expected to contribute financially for housing costs. There are no job offers that could be confirmed by the Investigative Unit of the Board in Los Angeles. It is unrealistic to believe that Mr. Clay will drive two hours every day from Los Angeles to San Diego and back, particularly in light of his employment history and the minor disciplinaries he has received for failing to report to work.

Mr. Clay's lack of employment is significant, particularly given Mr. Clay's psychiatric reports. All of Mr. Clay's recent psychiatric reports indicate that substance abuse is a risk factor, which may be a precursor to violence for Mr. Clay. Without a job or any viable means of support, it would be easy for Mr. Clay to regress back to substance abuse, endangering those around him. Therefore, until there are more concrete employment plans, I believe Mr. Clay is unsuitable for parole.

[Resp. Ex. 4].

After former Governor Davis reversed the BPT's parole suitability determination, petitioner sought habeas relief in the state courts. On May 27, 2004, the California superior Court denied petitioner's

habeas petition, concluding that there was "some evidence" to support the former Governor's decision. [Resp. Ex. 7].[19] The Superior Court, however, noted that the then-undecided issue of the BPT's duty to distinguish between murders that are more or less cruel or callous was significant, particularly in cases such as petitioner's where the inmate "may not have delivered the fatal injuries." [Resp. Ex. 7]
The California Court of Appeal and the California Supreme Court both rejected petitioner's claims without explanation. [Resp. Exs. 8 & 9)

Petitioner's contentions

Petitioner alleges that former Governor Davis's reversal of the BPT's finding of parole suitability violated petitioner's right to due process because (a) it was not supported by "some evidence," (2) it was based upon unchanging factors (such as the commitment offense),which had been used to deny parole on fifteen prior occasions, (3) it was not based upon reliable evidence that is relevant to the issue of whether petitioner posed a risk to the community if released, and (4)it was not a proper application of the California Penal Code and applicable regulations. [Petition at 6-7].

Standard of review

This case is governed by the provisions of the Antiterrorism and Effective Death Penalty Act of 1996 ('AEDPA"). Rios v. Rocha, 299 F.3d 796, 799 n.4 (9th Cir. 2002). As explained by the Supreme Court, the AEDPA "places a new constraint on the power of a federal habeas court to grant a state prisoner's

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[19] The Superior Court did not identify the evidence upon which it relied in so concluding.

application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court". Williams v. Taylor, 529 U.S. 362, 412 (2000).

Under the AEDPA, a federal court may not grant a writ of habeascorpus on behalf of a person in state custody "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim - (1) resulted in a decision thatwas contrary to, or involved an unreasonable application of, clearly I. i" established Federal law, as determined by the Supreme Court of theUnited States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254 (d).

Section ."2254 (d) (1)'s 'contrary to' and 'unreasonable application' clauses have independent meaning." Bell v. Cone, 535 7 U.S. 685, 694 (2002).

Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts. Under the "unreasonable application" clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from this Court's. decisions but unreasonably applies that principle to the facts of the prisoner's case.
Williams, 529 U.S. at 412-13; Lockyer v. Andrade, 538 U.S. 63, 73-76 (2003); see Weighall v. Middle, 215 F.3d 1058, 1061 (9th Cir. 2000) (discussing Williams).

While only Supreme Court precedent is controlling under the 24 AEDPA, other case law is persuasive authority "for purposes of determining

whether a particular state court decision is an unreasonable application of supreme court law." Vlasak v. Superior Court of California ex rel. County of Los Angeles, 329 F.3d 683, 687 (9th Cir. 2003) (quoting Luna v. Cambra, 306 F.3d 954, 960 (9th Cir. (2002) internal quotation 'marks and citation omitted), amended, 3112 F.3d 928 (9th Cir. 2002)); see Bruce v. Terhune, 376 F.3d 950, 956 (9th Cir. 2004) ("Although only the Supreme Court I s precedents are binding on state courts under AEDPA, our precedents may provide guidance as we review state-court determinations.").

Generally, when a higher state court has denied a claim without explanation, federal courts "look through" that denial to the last reasoned state decision. See Ylst v. Nunnemaker, 501 U.S. 797, 803-806 (1991); Shackleford v, Hubbard, 234 F.3d 1072, n.2 (9th Cir.2000), cert. denied, 534 U.S. 944 (2001). Where no state court .has provided a reasoned explanation for rejecting a petitioner's federal claim. a review of the record is the only means of deciding whether the state courts' determination was objectively reasonable. Greene v.Lambert, 288 F.3d lOBI, 1088-1089 (9th Cir. 2002).

Finally, the AEDPA provides that state court findings of fact are presumed to be correct unless the petitioner rebuts that presumptionby clear and convincing evidence. 28 U.S.C. § 2254 (e)

Discussion[20]

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[20] It appears that petitioner may have had a subsequent parolehearing after the date on which he filed this petition. [Resp. · Ex. 6(notation indicating that a subsequent parole hearing was scheduled forJuly, 2005)] Assuming that a subsequent parole hearing has been held,it does not render this petition moot. First, petitioner is still incustody as a result of

(continued...)

**Federal law**

The due Process Clause of the Fourteenth Amendment prohibits state action that drprives a person of life, liberty, or property without due process law. A person alleging a due process violation must first demonstrate that he or she was deprived of a liberty of property interest protected by the Due Process Clause, and then show that the procedures that led to the deprivation were not constitutionally sufficient. Kentucky Deplt of Corrections v. Thompson, 490 U.S. 454, 459-460 (1989); McQuillionv. Duncan, 306 F.3d9 895, 900 (9th Cir. 2002).

In the parole context, a prisoner alleging a due process claim must demonstrate the existence of a protected liberty interest in parole, and the denial of one or more of the procedural protections that must be afforded when a prisoner has a liberty interest in parole. The Supreme Court held in 1979, and reitereated in 1987, that "a state's statutory scheme, if it uses mandatory language, creates a presumption that parole release will be granted when or unless certain designated findings are made, and thereby gives rise to a constitutional liberty interest.:

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(...continued)
the former Governor's decision. Second,petitioner's claims challenging the denial of parole fall within the"capable of repetition yet evading review" exception to mootness. SeeHubbart v. Knapp, 379 F.3d 773, 777 (9th Cir. 2004) (habeas petitionchallenging a two-year commitment under California's Sexually ViolentPredator Act was found to "evade review" becatise the duration of thecommitment was too short to be fully litigated prior to its expiration) ;cert. denied, u.s. , 125 B.Ct. 913 (2005).

McQuillion, 306 F.3d at 901 (citing Greenholtz v. Inmates of Nebraska Penal, 442 U.S. 1, 7 (1979) and Board of Pardons v. Allen, 482 U.S. 369, 373 (1987)). [21] The Ninth circuit has held that California's parole scheme creates a cognizable liberty interest in release on parole because Penal Code § 3041 uses mandatory language and is similar to the Nebraska and Montana statutes addressed in Greenholtz and Allen. McQuillion, 306 F.3d at 901-902. As the Ninth Circuit has explained, "Section 3041 of the California Penal Code creates in every inmate a cognizable liberty interest in parole which is protected by the procedural safeguards of the Due Process Clause," and that interest arises "upon the incarceration of the inmate." Biggs v. Terhune, 334 F.3d 910, 914-915 (9th Cir. 2003).

Respondent contends that McQuillion is no longer good law because of an intervening decision of the California Supreme Court. It is true, of course, that after the Ninth Circuit's decision in McQuillion, the California Supreme Court addressed a portion of the California parole statute, Cal.Penal Code §3041. In re Dannenberg, 34 Cal.4th 1061 (2005), cert. denied, 126 S.ct. (2005). That decision, however, does not mean what respondent says it means, and it does not undercut McQuillion. In Dannenberg, the California Supreme Court held that the BPT need not engage in a "uniform term" ,analysis under

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[21] Respondent argues that in Sandin v. Conner, 515 U.S. 472 (1995), the Supreme Court criticized the mandatory languate methodology described in Greenholtz and Allen, and that under Sandin, California has not created a protected liberty interest in parole. [Answer at 7-10]. The Ninth Circuit, however, has rejected that argument, explaining that Sandin's holding is limited to internal prison disciplinary regulations. McQuillion, 306 F.3d at 903.

section 3041(a) if it determines that public safety concerns warrant denial of parole under section 3041 (b) . Dannenberg, 34 Cal. 4th at 1082-1094. The court did not hold that there is no protected liberty interest in parole whatsoever. It simply held that the BPT was not required to compare one inmate's parole suitability with the parole suitability determinations given to other inmates who had been convicted of similar crimes, at least under some circumstances. See Dannenberg, 34 Cal. 4th at 1098 n. Indeed, California courts continue to analyze claims regarding denial of parole under the Due Process Clause, even after Dannenberg. See In re Scott, 13326 Cal.App.4th 573 (2005) (citing Dannenberg, and granting habeas relief to inmate, finding that the Governor's failure to consider evidence that an inmate committed the offense while under stress was arbitrary and capricious, that "some evidence" did not support the Governor's finding that the gravity of the murder that the inmate committed made him unsuitable for parole, and that no evidence supportedovernor's reliance on the inmate's criminal history). Furthermore, Dannenberg's holding is limited to the uniform term provision of section 3041(a). The Ninth Circuit, in reaching its determination that the California parole scheme created a liberty interest protected by the Due Process Clause, only considered the language of section -3041(b). McQuillion, 306 F.3d at 902. Because the California Supreme Court did not reinterpret section 3041 (b) and the reasoning in McQuillion is based solely on section 3041(b), Dannenberg does not undermine the Ninth Circuit's decision. Therefore, the Ninth Circuit's holding in McQuillion that the mandatory language of section 3041(b) creates a liberty interest in parole remains

controlling precedent. See, e.g., Machado v. Kane, 2005 WL 3299885, .*2 (N.D.Cal. 2005)16 (discussing Dannenberg and concluding that "[t]his Section 3041 requirement to grant parole except under certain circumstances creates a cognizable liberty interest in parole which is protected by the procedural safeguards of the Due Process Clause for every eligible inmate.") (citing Biggs, 334 F.3d at 913 -915); Murillo v. Perez, 200521 WL 2592420, at *3, n.l (C.D.Cal. 2005) (holding that Dannenberg did not change the law as set forth in McQuillion; Saifullay v. Carey 2005 WL 1555389, at *8 (E.D. Cal. 2005) (finding a liberty interest in parole in California post Dannenberg); Thompson v. Carey, 2005 WL 3287503, *4 (E.D.Cal. 2005) (same); Deviries v. Schwarzenegger, 2005 WL 2604203 (E.D.Cal. 2005) (same) but see Sass v. Cal. Bd. Of Prison Terms, 376 F.Supp.2d 975, 982 (E.D.Cal. 2005) (holding that given the California Supreme Court's decision in Dannenberg, there is no liberty interest in parole in California).

Nevertheless, because parole proceedings are not part of the criminal prosecution, the full panoply of rights due a defendant in a criminal proceeding is not contitutionally mandated. Jancsek v. Oregon Bd. Of Parole, 833 F.2d 1389, 1390 (9th Cir. 1987). Instead, the due process rights that flow from a liberty interest in parole are limited; the prisoner must be provided with notice of the hearing, and opportunity to be heard, and if parole is denied, a statement of the reasons for the denial.[22]

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[22] Petitioner does not allege that he was denied notice of the parole ,hearing, an opportunity to be heard, or a statement of thereasons for the denial of parole suitability. In fact, the record reflects that he received each of these procedural protections.

(continued...)

Greenholtz, 442 US. at 16; Jancsek, 833 F.2d10 at 1390 (citing Greenholtz, 442 U.S. at 16); see also Morrissey v. Brewer, 408 U.S. 471, 481 c (1972) (describing the proceduralprotections due in the parole context) . In addition, due process requires that "some evidence" support the parole board's determination, and that the evidence must have "some indicia of reliability." Biggs, 334 F.3d at 915"; McQuillion, 306 F.3d at 904; Jancsek, 833 F.2d at 1390 (adopting the "some evidence" standard set forth by the Supreme Court in Superintendent v. Hill, 472 U.S. 445, 18 457 (1985));[23] see also Caswell v. Calderon, 363 F.3d 832,839 (9th Cir. (2004). The "some evidence" standard is satisfied if there is any reliable evidence in the record that could support the conclusion reached. Powell v. Gomez, 33 F.3d 39, 40 (9th Cir. 1994) (citing Hill 472 U.S. 445, 455-456 and Cato v. Rushen, 824 F.2d 703, 705 (9th Cir. 1987)). Finally determining whether the "some evidence standard was met does not require examination of the entire record, independent assessment of the

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(...continued)

[23] In Hill, the Supreme Court stated that [i]n a variety of contexts, the Court has recognized that a governmental decision resulting in the loss of an important liberty interest violates due process if the decision is not supported by any evidence. See, e.g. Douglas v. Buder, 412 U.S. 430, 432 (1973) (per curiam) (revocation of probation); Schware v. Board of Bar Examiners, 353 U.S. 232, 239 (1957) (denial of admission to bar); United States ex rel. Vajtauer v. Commissioner of Immigration, 273 U. S. 103, 106 (1927) (deportation). Hill, 472 U. S. at 455. The Supreme Court then held that "the requirements of due process are satisfied if some evidence supports the decision by the prison disciplinary board to revoke good time credits." Hill, 472 U.S. at 455.

credibility of witnesses, or the weighing of evidence. Toussaint v. McCarthy, 801 F.2d 1080, 1105 (9th Cir. 1986), cert. denied, 481 U.S. 1069. (1987).

Application to petitioner's case

As detailed above, former Governor Davis provided the following reasons for finding petitioner unsuitable for parole: (1) petitioner's crime was committed "in an especially heinous and atrocious manner"with an "exceptionally callous disregard for human life;" (2) petitioner's prior criminal history demonstratedan inability to remain crime-free in an uncontrolled setting (3) petitioner had not sufficiently participated in beneficial self-help programs, and needed continued participation in self-help in order to "further delve intothe causative factors for his participation in the life crime;u and(4) petitioner's parole plans are unrealistic because his job offer is in San Diego, but his housing is in Los Angeles.

1. Reliance on petitioner's commitment offense and prior criminal history violated due process

Former Governor Davis found petitioner unsuitable for parole based upon the gravity of his crime and his criminal history. In Biggs, however, the Ninth Circuit stated that continued reliance on an unchanging factor such as the circumstances of the offense could result in a due process violation. Biggs was serving a sentence of twenty-five years to life following a 1985 first degree murder conviction. He challenged a 1999 decision by the EPT finding him unsuitable for parole despite his record as a model prisoner. Biggs, 334 F. 3d at 913. While the Ninth Circuit rejected several of the reasons given by the BPT for finding Biggs unsuitable for parole, it upheld three: (1) petitioner's commitment offense

involved the murder of a witness; (2) the murder was carried out in a manner exhibiting a callous disregard for the life and suffering of another; and (3) petitioner could benefit from therapy. Biggs, 334 F.3d at 913. Nevertheless, the Ninth Circuit cautioned the BPT about continued reliance on the gravity of the commitment offense and petitioner's conduct prior to the commitment offense, explaining that

[a] s in the present instance, the parole board's sole supportable reliance on the gravity of the offense and conduct prior to imprisonment to justify denial of parole can be initially justified as fulfilling the requirements set forth by state law. Over time, however, should Biggs continue to demonstrate exemplary behavior and evidence of rehabilitation, denying him a parole date sin~ly because of the nature of his offense would raise serious questions involving his liberty interest.

Biggs, 334 F. 3d at 916. The Ninth Circuit further stated that "[a]continued .reliance in the future on an unchanging factor, the circumstance of the offense and conduct prior to imprisonment, runs contrary to the rehabilitative goals espoused by the· prison system and could result in a due process violation." Biggs, 334 F.3d at 917.

One district court has explained the rationale underlying aspect of Biggs as follows:

Whether the facts of the crime of conviction, or other unchanged criteria, affect the parole eligibility decision can only be predicated on the "predictive value" of the unchanged circumstance. Otherwise, if the unchanged circumstance per se can be used to deny parole eligibility, sentencing is taken out of the hands of the judge and totally reposited in the hands of the BPT. That is, parole eligibility could be

indefinitely and forever delayed based on the nature of the crime even though the sentence given set forth the possibility of parole--a sentence given with the facts of the crime fresh in the mind of the judge. While it would not be a constitutional violation to forego parole altogether for certain crimes, what the state cannot constitutionally do is have a sham system where the judge promises the possibility of parole, but because of the nature of the crime, the BPT effectively deletes such from the system. Nor can a parole system, where parole is mandated to be determined on someone's future potential to harm the community, constitutionally exist where despite 20 or more years of prison life which indicates the absence of danger to the community in the future, the BPT commissioners revulsion towards the crime itself, or some other unchanged circumstance, constitutes the alpha and omega of the decision. Nobody elected the BPT commissioners as sentencing judges. Rather in some realistic way, the facts of the unchanged circumstance must indicate a present danger to the community if released, and this can only be assessed not in a vacuum, after four or five eligibility hearings, but counterpoised against the backdrop of prison events.

Blair v. Folsom State Prison, 2005 WL 2219220, *12 n.3 (E.D.Cal. 2005), report and recommendation adopted by,2005 WL 3081634 (E.D.Cal. 2005).

In the circumstances of this case, former Governor Davis's reliance upon the facts of petitioner's crime and his prior criminal history violated due process. First, continued reliance upon these unchanging factors makes a sham of California's parole system and amounts to an arbitrary denial of petitioner's

liberty interest. Petitioner had been denied parole on fifteen occasions prior to the determination he now challenges.

> Continued reliance upon these unchanging factors amounts to converting petitioner's sentence of seven years to life to a term of life without the possibility of parole. As one court has put it; continuous reliance on unchanging circumstances transforms an offense for which California law provides eligibility for parole into a de facto life imprisonment without the possibility of parole. The court asks rhetorically--what is it about the circumstances of petitioner's crime or motivation which are going to change? The answer is nothing. The circumstances of the crimes will always be what they were, and petitioner's motive for committing them will always be trivial. Petitioner has no hope for ever obtaining parole except perhaps that a panel in the future will arbitrarily hold that the circumstances were not that serious or the motive was more than trivial. Given that no one seriously contends lack of seriousness or lack of triviality at the present time, the potential for parole in this case is remote to the point of non-existence. Petitioner's liberty interest should not be determined by such an arbitrary, remote possibility.

Irons v. Warden of California State Prison--Solano, 358 F.Supp.2d 936, 947 (E.D.Cal. 2005).

Second, the circumstances of the crime and petitioner's criminal history do not amount to some evidence supporting the conclusion that petitioner poses an unreasonable risk of danger if released. As discussed, "[i]n the parole context, the requirements of due process are met if some evidence supports the decision" and the evidence underlying the decision is

supported by "some indicia of reliability.".Biggs, 334 F. 3d at 914 (internal quotations omitted); Caswell, 363 F. 3d at 839; see Hill, 4.72 U. S. at 455-456. While it may have been reasonable to rely upon petitioner's crime and criminal history as an indicator of dangerousness for some period of time, continued reliance on such unchanging circumstances - after thirty years of incarceration and more than a dozen parole suitability hearings - violates due process because these factors lack predictive value with regard to petitioner's present and future dangerousness. After nearly thirty years of rehabilitation, the ability to predict a prisoner's future dangerousness based simply on the circumstances of the crime and petitioner's prior criminal history is nil. See Irons, 358 F.Supp:2d at 94'/ n. 2. Even the California courts have said as much. In re Scott, 133 Cal. App. 4th at 595 ("The commitment offense can negate suitability only if circumstances of the crime reliably established by evidence in the record rationally indicate that the offender will present an unreasonable public safety risk if released from prison. Yet the predictive value of the commitment offense may be very questionable after a long period of time."). In the circumstances of petitioner's case, the facts surrounding petitioner's crime and criminal history no longer amount to "some evidence" supporting the conclusion that petitioner is a danger to the community.

Petitioner's case is exactly what Biggs envisioned when it stated that repeated refusals to grant a parole release date to an inmate with an exemplary post-conviction record may violate the prisoner's due process rights. Biggs, 334 F.3d at 919. The record is replete with evidence of petitioner's remorse and rehabilitation, including positive

psychological reports, extensive self-improvement through educational and vocational advancements as well as therapy, and more than a dozen years of disciplinary-free incarceration (with absolutely no indication of any violent conduct while incarcerated). While the BPT may initially have been entitled to rely upon the commitment offense and .petitioner's criminal history to find petitioner unsuitable for parole, under these circumstances, the continued reliance on these pre-conviction factors by former Governor Davis even after the BPT had abandoned them violated due process because it resulted in an arbitrary decision and because these factors do not now constitute "some evidence" with "some indicia of reliability" of petitioner's dangerousness. See Hill, 472 U.S. at 455; Biggs, 334'F.3d at 917; Irons, 358 F.Supp.2d at 947; Masoner v. State, 2004 WL 108177 *1-2 (C.D . Cal. 2004).

2. The other factors relied upon by former Governor Davis are not supported by some evldence with indicia of reliability

As discussed due process requires that some reliable evidence support the decision to deny parole. See Hill 472 U.S. at 45 Biggs. 334 F. 3d at 914 (internal quotations omitted); Caswell, 363 F.3d at 839. The other two reasons given by former Governor Davis for finding petitioner unsuitable for parole the need for more participation in self-help" and more realistic parole plans - lack any medical or evidentiary support. First, the former governor's lay conclusion that petitioner,needed to participate in more "self-help"in order to, gain insight into his of fense is contradicted by the psychiatric evidence in the ,record. As detailed above, Dr. Fishback reported that petitioner participated in a lifer s group including 33 sessions, explained that petitioner

understood his crime at a "deep level" with regard to "thinking, impulse control, and risk factors " and that petitioner's dangerousness level was "at or below the minimum level appropriate for release." [Resp. Ex. 3 at 27] . Former Governor Davis does not cite any medical or psychological reports that are inconsistent with Dr. Fishback's opinions, and nothing in the record before this Court suggests that such inconsistent reports exist. Thus, the psychological reports and prison records refute former Governor Davis's reasoning, and demonstrate that petitioner already has participated in numerous self help programs, gained substantial insight about his crime, and is no longer a threat to others. [Resp. 23 Ex. 3 at 32-3 7] . Indeed, even the deputy commissioner with whom former Governor Davis purported to agree on this point recognized that petitioner had participated in an abundance of "self-help" programs. As Commissioner Lopez stated after noting that one of petitioner's programs was completed in 1998, "I just wanted to let you know you've continually challenged yourself with the different therapy groups and all that." [Resp. Ex. 3 at 30]. Similarly, in the most recent hearing, while she was reviewing the file with respect to petitioner's participation in prison programs, the deputy commissioner noted "you've been very busy, sir, to say the least." [Resp. Ex. 3 at 30] Finally, when asked what additional actions petitioner could take to become suitable for parole, the deputy commissioner responded "you know what, Mr. Clay, you're the best I've seen, to be honest with you." [Resp. Ex. 3 at 53]. Because there is no reliable support for it, former Governor Davis's reliance upon allegedly insufficient participation in "self-help" and "insight" does not amount to "some evidence" for

denying parole suitability. [24] See Irons, 35B F.Supp.2d at 948 (holding that the BPT's conclusion that the petitioner needed more therapy so he could cope with stress in a nondestructive manner was, unsupported by any medical or other evidence to 'support it (and therefore did not amount to "some evidence" supporting the BPT's determination); explaining that "the conclusion appears 'to be simply one repeated often in order to add another factor to the nonsuitability conclusion.

Likewise, former Governor Davis's assertion that petitioner's parole plans were not concrete or realistic is not supported by any reliable evidence the record. The relevant regulation provides that one of the circumstances that tends to indicate parole suitability is "Understanding and plans for Future. The prisoner has made realistic plans for release or has developed marketable skills that can be put to use upon release." 15 Cal.Code of Regs. § 2402(d) (8). There is dispute that petitioner had a place to live, [25] social and financial support, and a concrete job

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7 Furthermore, former Governor Davis l s suggestion that petitioner's nself-help" reflected only "recent gains" that were not made "over a sustained period of time" is actually refuted by the record, [Resp. Ex. 4]. As detailed above. petitioner had been disciplinary free for more than a decade, had received his GED 14 years earlier, and had earned a vocational "degree" in electronics from "way. way back." [Resp. Ex. 3 at 25-32), As the presiding commissioner noted, petitioner got "heavily involved in all sorts of programs" sometime in the 1990s. [Resp. Ex. 3 at 37) .

[8]Former Governor Davis also mentioned that petitioner was "expected to contribute financially" to his housing costs. [Resp.Ex. 4]. It is not clear to what he is referring. In any event, nothing in the record suggests that the offers of housing were conditioned upon a financial contribution from petitioner. [See Resp. Ex 3 at 18-25].

offer. The fact that the job offer would require a significant commute, one that petitioner was willing and apparently able to accomplish, does not make his plans unrealistic. [26] In addition, the record reflects that petitioner had received numerous offers of help from family and friends, which included offers to assist petitioner in ways that would enable him to find more convenient employment. [See Resp. Ex. 3 at 17-25]. Finally, petitioner had developed a marketable skill by obtaining a vocational electronics certificate. [See Resp. Ex. 3 at 29]. Therefore, the record demonstrates concrete parole plans, and the conclusion that the long commute rendered petitioner's plans "unrealistic" is speculative and lacks reliable support in the record. See McQuillion, 306 F.3d at 911 (finding that there was no evidence supporting a finding that the prisoner lacked adequate parole plans where his plans "involved the establishment of a community re-entry program for prison parolees," and where the prisoner "addressed at length his plans for the program, outlining his funding prospects and project goals and answering specific questions from panel members."); In re Stanworth, 33 Ca1.3d 176, 178 (1982) (noting that realistic parole plans existed where there was a $12,000 irrevocable educational trust fund set .up on the inmate's behalf and a personal $3,000 savings account); In re Lowe, 130 Cal.App.4th 1405, 1413 (2005) (reciting that the BPT had found that the

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[26] Perhaps regrettably, lengthy commutes are becoming increasingly common in our society. See e.q. Rick Lyman, "In Exurbs, Life Framed by Hours Spent in the Car; Time for Family and Community Eroding," The New York Times, December 18, 2005, p. A29.

inmate had realistic parole plans, which consisted of "family support, a place to stay, an offer of help with finding a job, and a trust fund so that he has the 'means to support himself and not be a burden to society while he's reintegrating back into society.'").

Because there is no reliable evidence supporting former Governor Davis' s conclusion that petitioner is unsuitable for parole, that determination violates due process. See Hill, 472 U.S. at 455. The state court's determination to the contrary was based upon an unreasonable determination of the facts in light of the evidencepresented during the parole hearing and amounted to an unreasonable application of clearly established Supreme Court precedent. See Hill, 472 U.S. at 455 Taylor v.Maddox, 366 F.3d 992, 999-1000 (9th Cir.),cert. denied, 125 S. Ct. B09 (2004). Accordingly, petitioner is entitled to relief. [27] See McQuillion, 306 F.3d at 912 (finding that petitioner was entitled to relief where none of the four grounds for recision of petitioner's parole release date was supported by "some evidence" and therefore the decision violated due process); Irons, 358 F.Supp.2d at 947-951 (granting habeas relief where the BPT[28]

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[27] Although it is not clear whether he is doing so, to the extent that petitioner alleges that he was denied his right to a parole release date under sention 3041(a) or denied a parole release date that was comparable to parole release dates granted to inmates convicted of similar crimes, his claim is foreclosed by Dannenberg and also fails to raise a cognizable federal issues. See Estelle v. McGuire, 502 U.S. 62, 67-68 (1991).

[28] Nothing suggests that petitioner has committed any violent act subsequent to the BPT's 2003 hearing, so there is no reason not to require immediate release.

improperly relied upon the unchanging ircumstances of the commitment offense in finding petitioner unsuitable for parole in his fifth parole suitability hearing, and also asserted that petitioner need more therapy, a conclusion that lacked any support in the record)" Saifullah, 2005 WL 1555389 at *13-16 (granting habeas relief where the record contained no evidence supporting the BPT's qecision that petitioner was a danger to society and unsuitable for parole based upon (a) his commitment offense, (b) his prior criminal history, and (c) a rules violation which resulted when, based upon his religious beliefs, petitioner refused to cut his hair).

Conclusion

For the foregoing reasons, the, petition should be granted. The record is not clear whether, when the BPT found petitioner suitable for parole, it set a particular parole release date or simply laid the groundwork for the computation of such a date. If the BPT set a parole release date, respondent should be directed to reinstate that date. If the BPT merely laid the groundwork for the setting of a parole release date, respondent should'be directed to set petitioner's 'parole release date consistent with that computation. In either case, if the parole release date already has passed, respondent shall release petitioner on parole within thirty (30) days of the date of entry of judgment. McQuillion V. Duncan, 342 F.3d 1012, 1015-1016 (9th Cir. 2003) (affirming grant of relief on appeal after remand, and explaining that proper relief is immediate release rather than remand for further parole proceedings Where no evidence in the record supported the BPT's determination that the petitioner was not suitable for parole) Saifullah, 2005 WL 1555389 at *16 ("In

the absence of any evidence in the record supporting the Board's decision, remanding the case for a new hearing is futile, and the appropriate remedy is to grant the release of the petioner."). Respondent shall do so within thirty days of the date of entry of Judgment.

Dated:

Andrew J. Wistrick
United States Magistrate Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FILED
CLERK,U.S.
DISTRICT COURT
MAR 9, 2007
Central District of
California
By /s/ DEPUTY

ELIJAH CLAY,

Petitioner,

vs.

A.P. KANE, WARDEN,

Respondent. /

Case No. LACV 04-8663 VAP (AJW)

)ORDER ADOPTING
)REPORT AND
)RECOMMENDATION
)OF MAGISTRATE
)JUDGE

The court has reviewed the entire record in this action, the Report and Recommenation of Magistate Judge ("Report"), and Petitioner's objections. Further, the Court has reviewed the Ninth Circuit's recent decisions affirming that California Penal Code section 3041 gives all California prisoners, including those with indeterminate life sentences, a liberty interest that is protected by due process. See Irons v. Carey, __F.3d , 2007 U.S. App. LEXIS 5198, at *7 (9th Cir. Mar. 6, 2007) (reaffirming that section 3041 vests "California prisoners whose sentences provide for the possibility of parole with a constitutionally protected liberty interest in the receipt of a parole release date, a liberty interest that is protected by the procedural

safeguards of the Due Process Clause"); Sass v. Cal. Bd. Of Prison Terms, 461 F.3d 1123, 1127-28 (9th Cir. 2006) ("[Dannenberg] did not hold that section 3041(b) does not use mandatory language.") The court concurs with and adopts the findings of fact, conclusions of law, and recommendations contained in the Report after having made a de novo determination of the portions to which objections were directed.

Dated: March, 7, 2007

*/s/ Virginia A. Phillips*
Virginia A. Phillips
United States District Judge

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION

FILED
CLERK, U.S.
DISTRICT COURT
MAR 9, 2007
Central District of
California
By /s/ DEPUTY

| | |
|---|---|
| ELIJAH CLAY,<br>Petitioner,<br><br>vs.<br><br>A.P. KANE, WARDEN<br>Respondent. | Case No. CV 04-6883-VAP (AJW)<br>)<br>)<br>)<br>)JUDGMENT<br>)<br>) |

It is hereby adjudged that the petition for a writ of habeas corpus is granted, and respondent is directed to set a parole release date in accordance with the Board of Prison Terms's prior determination finding petitioner suitable for parole, and release petitioner on parole if that date has passed, within thirty (30) days of the date of entry of judgment.

Dated: /s/ March, 7, 2007

*/s/ Virginia A. Phillips*
Virginia A. Phillips
United States District Judge

THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77.(d) ENTERED – WESTERN DIVISION CLERK, U.S. DISTRICT COURT MAR 12 2007 CENTRAL DISTRICT OF CALIFORNIA BY /s/ DEPUTY

***SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES***

DEPT 100

| | |
|---|---|
| Date: MAY 27, 2004 | L. TOWNSENDDeputy Clerk |
| Honorable: DAVID S. WESLEY Judge | NONE Reporter |
| NONE Bailiff | |

(Parties and Counsel checked if present)

BH002566
IN RE:
ELIJAH CLAY Counsel for Petitioner:
Petitioner
On Habeas Corpus Counsel for Respondent:

Nature of Proceedings: ORDER RE: WRIT OF HABEAS CORPUS

The court has read and considered Petitioner's Writ of Habeas Corpus filed on January 5, 2004. Having independently reviewed the record, giving deference to the Governor's broad discretion in parole matters, the Court concludes that the record contains "some evidence" to support the Governor's finding that Petitioner is unsuitable for parole. (*In re Rosenkrantz* (2002) 29 Cal.4th 616, 667; *see* Cal. Code Regs., tit. 15 §2281.)

On April 25, 1978 Petitioner was received into custody after being convicted of first-degree murder in violation of Penal Code § 187. Petitioner was sentenced to seven years to life. His minimum eligible parole date was August 7, 1982.

On February 26, 2003, after having served more than twenty-four years, Petitioner appeared before the Panel of the Board of Prison Terms ("Panel") for a subsequent parole suitability hearing. The Panel reached a tie vote, with one member finding Petitioner suitable for parole and the other member finding Petitioner unsuitable for parole. The Board

of Prison Terms ("Board") then sat *en banc*, and, by a majority vote, found Petitioner suitable for parole. On April 30, 2003, however, the Governor reversed the Board, declaring Petitioner unsuitable for Parole.

Petitioner's Writ of Habeas Corpus challenges the Governor's decision. At issue is whether the recordd supports the Governor's finding.[29]

The evidence submitted to the Governor established that Petitioner and his brother Lemarn Clay decided to rob victim Barko Jesremovic, who was visiting Lemarn's apartment. (*See* February 26, 2003 Parole Hearing Transcript, attached as Exhibit B, 6-13.) The victim had been brought to the apartment as a guest of one of Lemarn's friends. (*See id.*) Petitioner, Lemarn, and the victim were drinking when Petitioner and Lemarn grabbed the victim and a struggle ensued. (*See id.*) Lemarn grabbed a knife off a coffee table and stabbed the victim. (*See id.*) The victim continued to struggle and, as Petitioner was holding him down. Lemarn hit him in the head with a wrench. (*See id.*) The victim passe out, and Lemarn and Petitioner gagged and bound the victim and placed him in the trunk of the victim's car. (*See id.*) They stole money from the victim as well as a toolbox from the trunk and drove the car to another location, where they abandoned it

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[29] Petitioner also alleges that the Governor exercises "unlimited discretion over parole matters." Further, Petitioner contends that the Governor's review of suitability decisions is an *ex post facto* violation. Petitioner's contentions are without merit. First, the Governor does not exercise "unlimited discretion," as the Governor, like the Board, is bound by the "some evidence" standard. (*See In re rosendrantz* (2002) 29 Cal.4th 616, 670.) Second, the *ex post facto* argument has been explicitly rejected by the California Supreme Court. (*See In re Rosenkrantz, supra*, 29 Cal.4th at 659-661.)

with the body inside. (*See id.*) A couple of days later Lemarn returned to the scene where the car had been abandonded and set the car on fire, fearing that there were fingerprints on the vehicle. (*See id.*)

As a juvenile, Petitioner was committed to the California Youth Authority for violating probation for vehicle theft. (*See* February 26, 2003 Parole Hearing Transcript, *supra* at 14.) As an adult, Petitioner was convicted of two counts of vehicle theft and sentenced to prison. (*See id.*) The record also shows that Petitioner received probation and served time in county jail, although the Panel failed to identify the relevant offenses. (*See id.* at 14-15.)

Petitioner has been married twice and has one biological child, who is also serving time in prison. (*See* February 26, 2003 Parole Hearing Transcript, *supra* at 16.) He has been married to his current wife since 1995. (*See id.*) Before being incarcerated, Petitioner worked variously as a truck mechanic, laborer, and auto dismantler. (*See id.*) His prior drug use includes alcohol and marijuana. (*See id.* at 17.)

Since his inarceration, Petitioner has completed his GED as well as a vocation in electronics. (*See* February 26, 2003 Parole Hearing Transcript, *supra* at 29-31.) He has also completed the Impact Workshop, a nine-month group therapy program, Anger Management, and HIV/AIDS course, and a creative writing course. (*See id.* at 26-28.) Petitioner has received four 115 disciplinary violations for serious misconduct, the last in 1990 for failure to report to work. (*See id.* at 32; *see also* Cal. Code Regs., tit. 15, §3312.)

The counselor's report indicates that Petitioner "pose[s] a low degree of threat." (February 23, 2003 Parole Hearing Transcript, *supra*, at 33.) The psychological report states tht Petitioner's "violence potential is... no more than that of the average citizen in the community." (*Id.* at 36.) The psychologist recommended that Petitioner continue with substance abuse treatment, given his history of drug and alcohol abuse. (*See id.* at 37.) Petitioner received many letters of support, including letters from his sisters, his son, and a longtime friend. (*See id.* at 17-25.) He has offers to live in the Los Angeles area and a job offer to work as a sales representative in San Diego. (*See id.*)

The Panel reached a tie-vote, but the Board meeting *en banc,* found Petitioner suitable for parole. However, former Governor Gray Davis reversed the Board. (*See* Indeterminate Sentence Parole Release Review, attached as Exhibit A.) The Governor found that the crime, wherein the victim was stabbed, hit in the head with a wernch, bound and gagged, and left for dead in the trunk of a car, "especially heinous" and, by itself, sufficient to support a finding of unsuitability. (*Id.*) Further, the Governor noted Petitioner's prior criminal history and expressed concern as to Petitioner's parole plans, observing that Petitioenr's plans include living in Los Angeles but working in San Diego. (*See id.*) While the Governor acknowledged Petitioner's accomplishments, he found that Petitioner's substance abuse history required more "concrete" parole plans, so that Petitioner does not 'regress back to substance abuse." (*Id.*)

The record reveals that the Governor's findings are supported by "some evidence". (*In re Rosekrantz* (2002) 29 Cal.4th 616, 667; *see* Cal Code Regs., tit. 15

§2281.) However, the Court notes the decision by the Court of Appeal for the First District in *In re Dannenberg* (2002) 125 Cal.Rptr.2d 458, *previously publised at* 102 Cal.App.4th 95, currently on review to the California Supreme Court, in which the Court of Appeal observed,

> Some murders are more cruel or callous than others, and it is the Board's duty to distinguish among them when weighing the gravity of an offense to determine an inmate's suitability for parole. (*Id.* at 468-69.)

The Court eagerly awaits guidance on this very important issue, particularly in cases, such as here, where Petitioner may not have delivered the fatal injuries. Accordingly, the petition is denied.

Order is filed and signed this date.

A copy of this order is sent via U.S. Mail addressed as follows:

ELIJAH CLAY B-92495
F WING-336-L
P.O. BOX 689
SOLEDAD, CA 93960-0689

Minutes Entered
05-27-04
County Clerk

**********FILE COPY**********

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION 2

DATE: July 8, 2004

Hon. David E. Wesley
Los Angeles Superior Court
111 North Hill Street
Los Angeles, CA 90012

In re:
Elijah Clay
on Habeas Corpus

B176163
Los Angeles County No. A327883

THE COURT:

Petition for Writ of Habeas Corpus is DENIED.

Court of Appeal, Second Appellate District, Division Two - No. B176163
S126439

Supreme Court
FILED
SEP 29 2004
Frederick K. Ohlrich Clerk
DEPUTY

IN THE SUPREME COURT OF CALIFORNIA
En Banc

In re ELIJAH CLAY on Habeas Corpus

Petition for review DENIED.

George, C.J., was absent and did not participate.
Brown, J., was recused and did not participate.

MORENO
Acting Chief Justice

| Case # | Authoring Judge | Notes |
|---|---|---|
| B176163 | | |

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**

JULY 12 2010

Molly C. Dwyer, Clerk
U.S. Court of Appeals

ELIJAH CLAY,

Petitioner - Appellee,

v.

A.P. KANE,

Respondent - Appellant

No. 07-55377

D.C.No.CV-04-08663-VAP
U.S. District Court for Central California, Los Angeles

MANDATE

The judgment of this Court, entered on June 18, 2010, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:
Molly C. Dwyer
Clerk of Court
Gabriela Van Allen
Deputy Clerk

SEAL of the GOVERNOR

Of the STATE OF CALIFORNIA

OFFICE OF THE GOVERNOR
September 30, 2003

VIA FACSIMILE AND U.S. MAIL

Mr. Elijah Clay, B-92495
*Correctional Training Facility, Central*
F Wing – 336 L
Post Office Box 705
Soledad, California 93960

Dear Mr. Clay:

Penal Code section 3041.2 authorizes the Governor to review parole decisions of the Board of Prison Terms concerning persons sentenced to an indeterminate term upon conviction of murder.

After considering the same factors considerd by the Board, the Governor has invoked his authoritiy to reverse the Board's decision to grant parole in your case. The Governor's statement of the reasons for his decision is attached.

A copy of this letter is being provided to you via facsimile, and the signed original (along with a statement of the reasons for his decision) is being sent by mail. Additionally, we are transmitting a copy of this letter and the attached decision to the Chairperson of the Board of Prison Terms.

Sincerely,

*/s/ Barry P. Goode*
BARRY P. GOODE

Secretary of Legal Affairs

cc: Ms. Carol A. Daly, Chairperson
The Board of Prison Terms
INDETERMINATE SENTENCE PAROLE RELEASE REVIEW
(Penal Code Section 3041.2)

Elijah Clay, B-92495
Second Degree Murder

NO ACTION

MODIFY

REVERSE X

According to the decision of the Court of Appeal, on March 10, 1976 Shirley Pine arrived home with Mr. Jevremovic and introduced him to her boyfriend, Learman Clay, his brother Elijah Clay, and Sharon Grant. Mr. Jevremovic, whom Shirley had met ten minutes earlier, then sat on the counch next to Sharon and offered her a beer. Shirley went into another with room the Clay brothers. When they returned, Shirley told Sharon to move off the couch. Elijah Clay put a gun into Mr. Jevremovic's side and told his brother Learman to go into his pockets. Mr. Jevremovic hit Learman and knocked him into the wall. Learman picked up a knife from the table and stabbed Mr. Jevremovic in the side. The brothers then dragged Mr. Jevremovic into the bedroom and started beating him with the gun. When Sharon tried to stop them, Learman gave the knife to Shirley. Shirley put the knife against Sharon's side and made her return to the den.

Elijah sent Shirley to bring Mr. Jevremovic's car into the alley. Mr. Clay and his brother carried Mr. Jevremovic to his car. Shirley opened the trunk and the brothers placed Mr. Jevremovic into the trunk with his hands and feet tied together. Mr. Clay drove Mr. Jevremovic's car and while the others followed in another car. Mr. Clay abandoned Mr. Jevremovic's car, got into the car with the others and returned to Shirley's house.

On March 29, 1976, the police were summonded to the scene of a parked car. The strong odor of a dead body permeated the air. A portion of the car near the license plate was charred. A body, later identified as Mr. Jevremovic, was discovered with the hands tied with extension cord and the feet tied with wire. The body had a 5 inch deep stab wound to the right upper abdomen, three puncture woulds in the left shoulder, three fractured ribs, a fractured skull and several abrasions on the head.
Mr. Clay was arrested and convicted by a jury of first degree murder, first degree robbery, and use of a firearm during the commission of the offense. He was sentenced to life.

On February 26, 2003, a panel held a suitability hearing for Mr. Clay. The hearing ended in a tie vote. Mr. Clay's case was then referred to the Board of Prison Terms, sitting en banc. The Board, by a majority vote, found Mr. Clay suitable for parole. The Board found that Mr. Clay would not pose a threat to public safety if released from prison. They found Mr. Clay has enhanced his ability to function within the law upon release through participation in educational programs, self-help and therapy programs, and through vocational programs. They also found there was a reduced probability of recdiivism because of his maturation, growth,

greater understanding and age and that Mr. Clay has maintained positive institutional behavior and that he shows signs of remorse. Finally, they found that Mr. Clays' psychiatric reports support release.
I agree that Mr. Clay has made commendable progress while in prison. He completed his GED and received a certificate of completion in electronics. He has participated in Alcoholics Anonymous, the IMPACT Workshop, Lifer Group, Muslim Development Center's Anger Management, Millati Ismali Path to Recovery Addiction Program, Lifeskills Group, Success Tools of the Masters; and hepatitis, tuberculosis and HIV/AIDS training. Mr. Clay has also received several laudatories for his assistance and performance during critical periods; his attitude; and his work with staff and others. These are all positive factors lending support to a finding of suitability for parole for Mr. Clay. I have, however, considered all of the factors for suitability and unsuitability under California Code of Regulations, Title 15, section 2402 and believe that the positive factors are outweighed by each of several negative factors demonstrating Mr. Clay's unsuitability for parole at this time.

The crime was committed in an especially heinous and atrocious manner. It was clear that after Shirley brought Mr. Jevremovic home, a plan was hatched to rob him. Sharon was told to move off the couch to allow Mr. Clay and his brother complete access to Mr. Jevremovic. Mr. Clay stuck a gun in Mr. Jevremovic's side and told his brother to go through Mr. Jevremovic's pockets. When Mr. Jevremovic fought back, he was stabbed by Mr. Clay's brother. As he continued to fight, he was beaten with the gun. Mr. Clay and his broher then tied Mr. Jevremovic's hands behind him and tried his

feet together and stuffed him into the trunk of his car. Mr. Clay drove off and parked Mr. Jevremovic's car and left him in the trunk to die. Later, Mr. Clay's brother set the car on fire with Mr. Jevremovic still inside the trunk. These actions demonstrate an exceptionally callous disregard for human life.

Mr. Clay also took pains to avoid detection. He drove the car and parked it another location to avoid any trails suggesting it was he that committed the crime. The car was set on fire to eliminate any potential fingerprints. I find that the gravity of Mr. Clay's crime is not alone, sufficient to conclude that he is not suitable for release at this time.

Mr. Clay had a long history of prior criminal actions – including numerous robberies, which included a prior prison term, commitment to the Youth Authority, probation and county jail. Further, as noted by the deputy commissioner on the panel, Mr. Clay has not sufficiently participated in beneficial self-help programs and needs continued participation in self-help in order to further delve into causatrive factors for his participation in the life crime. The dissenting deputy commissioner found - and I agree – that until further progress is made, Mr. Clay continues to be unpredictable and a threat to others. The deputy commissioner also recommended that during the next year, Mr. Clay should remain disciplinary free and participate in whatever self-help becomes available. The recent gains Mr. Clay has made are commendable, but the gains need to be shown over a sustained period of time.

I also believe the Board gave inadequate consideration to Mr. Clay's extensive prior criminal history. The robbery is not an isolated incident, but the culmination of a life of crime that escalated in severity and violence. Mr. Clay has two convictions

for theft, one for resisting arrest, two for burlary, and then the instant murder. Mr. Clay has clearly failed numerous attempts to correct his criminal behavior. His demonstrated inability to remain crime-free in an uncontrolled setting causes me concern and demonstrates that he is not suitable for release at this time.

Finally, I agree with the observations of the Deputy District Attorney appearing at the hearing that Mr. Clay's parold plans are unrealistic. He has a job offer in San Diego, yet his offer of housing is in Los Angeles – and he is expected to contribute financially for housing costs. There are no job offers that could be confirmed by the Investigative Unit of the Board in Los Angeles. It is unrealistic to believe that Mr. Clay will drive two hours every day from Los Angeles to San Diego and back, particularly in light of his employment history and the minor disciplinaries he has received for failing to report to work.

Mr. Clay's lack of employment is significant, particularly given Mr. Clay's psychiatric reports. All of Mr. Clay's recent psychiatric reports indicate that substance abuse is a risk factor, which may be a precursor to violence for Mr. Clay. Without a job or any viable means of support, it would be easy for Mr. Clay to regress backt o substance abuse, endangering those around him. Therefore, until there are more concrete employment plans, I believe Mr. Clay is untuiable for parole.

I have reviewed Mr. Clay's record carefully and have considered each of the factors for assessign positive suitability for parole under California Code of Regulations, Titel 15, § 2402. I will idscuss above the specific factors, which I consider particularyly relevant. I find that each of the postivie factors

individually outweighs all the negative factors, and that Mr. Clay is not suitable for parole. I therefore REVERSE the Board of Prison Terms' decision to parole Mr. Clay.

Decision Date: 09/30/03

*/s/ Gray Davis*
GRAY DAVIS
Governor

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Sutter
Clerk of the Court
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Ms. Kimara A. Aarons
110 West A Street, Suite 1100
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Re: A.P. Kane, Warden
v. Elijah Clay
Application No. 07A994

Dear Ms. Aarons:

The application for stay pending appeal in the United States Court of Appeals for the Ninth Circuit case No. 07-55337 in the above-entitled case has been presented to Justice Kennedy, who on June 19, 2008 denied the application.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

By */s/ Danny Bickell*

Danny Bickell
Staff Attorney

# OPPOSITION BRIEF

No. 10-333

IN THE
Supreme Court of the United States

GARY SWARTHOUT, Warden,
Petitioner,

v.

DAMON COOKE,
Respondent

MATTHEW CATE, Warden,
Petitioner,

v.

ELIJAH CLAY,
Respondent

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

May a federal court grant habeas relief to a prisoner who possesses a liberty interest in parole unless he is currently dangerous (an interest created by mandatory state law governing release, as construed by the State's highest court) when that federal court concludes that (1) the State's refusal to set a parole date for the prisoner was based on a finding of current dangerousness that was not supported by "some evidence," and (2) the state court unreasonably denied the prisoner relief from that violation of due process?

## PARTIES TO THE PROCEEDING

The parties listed in the caption of the petition for a writ of certiorari and in the caption of this brief are the parties in this action. Petitioners filed a consolidated petition arising out of separate habeas corpus judgments in the court below concerning the entitlement of two California prisoners to parole dates. Petitioner Gary Swarthout is the Warden at the California prison where Respondent Damon Cooke is confined, and they were the parties below in Ninth Circuit Case No. 06-15444. Petitioner Matthew Cate is the Secretary of the California Department of Corrections and Rehabilitation, which is supervising Petitioner Elijah Clay, who was released from custody in June, 2008; they were the parties below in Ninth Circuit Case No. 07-55377.

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IN THE

**Supreme Court of the United States**

**BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI**

**CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED**

Besides the federal statutory provisions identified by Petitioners as relevant, this case also implicates the federal constitutional and state statutory and regulatory provisions identified below.

**United States Constitution, Amendment XIV.**

[N]or shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

**California Constitution, Article I, Section 7(a).**

A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws.

**California Penal Code Section 3041 (a), (b).**

(a) In the case of any inmate sentenced pursuant to any provision of law, other than Chapter 4.5 (commencing with Section 1170) of Title 7 of Part 2, the Board of Parole Hearings shall meet with each inmate during the third year of incarceration for the purposes of reviewing the inmate's file, making recommendations, and documenting activities and conduct pertinent to granting or withholding postconviction credit. One year prior to the inmate's minimum eligible parole release date a panel of two or more commissioners or deputy commissioners shall again meet with the inmate and shall normally set a parole release date as provided in Section 3041.5. No more than one member of the panel shall be a deputy commissioner. In the event of a tie vote, the matter shall be referred for an en banc review of

the record that was before the panel that rendered the tie vote. Upon en banc review, the board shall vote to either grant or deny parole and render a statement of decision. The en banc review shall be conducted pursuant to subdivision (e). The release date shall be set in a manner that will provide uniform terms for offenses of similar gravity and magnitude with respect to their threat to the public, and that will comply with the sentencing rules that the Judicial Council may issue and any sentencing information relevant to the setting of parole release dates. The board shall establish criteria for the setting of parole release dates and in doing so shall consider the number of victims of the crime for which the inmate was sentenced and other factors in mitigation or aggravation of the crime. At least one commissioner of the panel shall have been present at the last preceding meeting, unless it is not feasible to do so or where the last preceding meeting was the initial meeting. Any person on the hearing panel may request review of any decision regarding parole for an en banc hearing by the board. In case of a review, a majority vote in favor of parole by the board members participating in an en banc review is required to grant parole to any inmate.

(b) The panel or the board, sitting en banc, shall set a release date unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting. After the effective date of this subdivision, any decision of the parole panel finding an inmate suitable for parole shall become final within 120 days of the date of the hearing. During that period, the board may review the panel's decision. The panel's decision shall become final pursuant to this subdivision unless the board finds that the panel made an error of law, or that the panel's decision was based on an error of fact, or that new information should be presented to the board, any of which when corrected or considered by the board has a substantial likelihood of resulting in a substantially different decision upon a rehearing. In making this determination, the board shall consult with the commissioners who conducted the parole consideration hearing. No decision of the parole panel shall be disapproved and referred for rehearing.

except by a majority vote of the board, sitting en banc, following a public meeting.

**California Administrative Code, Title 15, Sections 2280-90.**
(See appendix to this opposition for these regulations.)

**California Administrative Code, Title 15, Sections 2400-11.**
(See appendix to this opposition for these regulations.)

**California Constitution, Article V, Section 8(b).**[1]
No decision of the parole authority of this State with respect to the granting, denial, revocation, or suspension of parole of a person sentenced to an indeterminate term upon conviction of murder shall become effective for a period of 30 days, during which the Governor may review the decision subject to procedures provided by statute. The Governor may only affirm, modify, or reverse the decision of the parole authority on the basis of the same factors which the parole authority is required to consider. The Governor shall report to the Legislature each parole decision affirmed, modified, or reversed, stating the pertinent facts and reasons for the action.

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[1] This provision is implicated in respondent Clay's case only, as respondent Cooke was convicted not of murder, but of attempted murder.

## STATEMENT OF THE CASE

Although the court of appeals granted habeas corpus based on determinations that the State had engaged in violations of clearly established federal law, some state law background is necessary to understand the federal proceedings.

California's parole law is unique among this nation's systems of parole in the manner in which it guarantees the right of parole and strictly limits the corollary power of the parole authority to deny parole.[2] Virtually no other jurisdiction provides a prisoner with so expansive a right to a parole date as California, while simultaneously constraining the parole authority from depriving a prisoner of that right. Thus, an answer to the question presented by the petition would have little if any practical bearing on any other jurisdiction in the country.

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[2] Respondents' reference to the "parole authority" comprehends both the Board of Parole Hearings and the Governor. "The governing statutes provide that the Board is the administrative agency within the executive branch that generally is authorized to grant parole and fix releases. . . ." *In re Rosenkrantz*, 29 Cal. 4th 616, 653 (Cal. 2002). Article V, section 8 (b) of the California Constitution, as already set forth, gives the Governor power to review the Board's decisions for convicted murderers such as Respondent Clay; in doing so, however, it "placed substantive limitations upon the Governor's exercise of that judgment and discretion" by requiring him to rely on the same facts and factors that control the Board's decision and subjecting him to the same legal constraints imposed upon the Board. *Id.* at 663-64. Thus, while the Board is the sole parole authority for a life prisoner such as respondent Cooke, who did not suffer a conviction of murder, the Board and the Governor act together in a complementary way as a single executive authority in parole determinations for life prisoners who, like respondent Clay, have been convicted of murder. Respondents here refer to them collectively as the parole authority.

California Penal Code "[s]ection 3041 addresses how the Board is to make parole decisions for indeterminate life inmates." *In re Dannenberg*, 34 Cal. 4th 1061, 1078 (Cal. 2005). That law sought to remedy "the parole authority's practice simply to defer . . . parole-release decisions until it 'developed the feeling in each individual case that the prisoner was "ready to go home."' *Id.* at 1088 (citation omitted; internal punctuation omitted). Under the old practice, "parole dates were not set, and prisoners had no idea when their confinement would end, until the moment the parole authority decided they were ready for release." *Id.* at 1077. "This system came into disfavor for many reasons. Not the least were complaints that it (1) failed to fit the punishment to the crime and (2) gave inmates no advance hope of a fixed date for release, thus actually promoting disciplinary problems with the prisons." *Id.* at 1089.

California enacted § 3041 as part of a broader reform that replaced its Indeterminate Sentencing Law (ISL) with a Determinate Sentencing Law (DSL), which established fixed sentences for most offenders and thus "resolved many of these issues with regard to the majority of felons." *Dannenberg*, 34 Cal. 4th at 1090. "But the problem of parole and term-setting standards remained for those serious offenders who, under the DSL, would retain indeterminate life-maximum sentences. Section 3041 sought for the first time to establish specific procedures for parole consideration for these offenders." *Id.* (citation omitted; internal punctuation omitted).[3]

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[3] As the California Supreme Court explained the ISL, the predecessor of the DSL:

> In the general field of criminal law the Legislature has abandoned the ancient notion of categorical punishment, the infliction of fixed terms for certain crimes, and substituted the

> indeterminate sentence, leaving to the Adult Authority the judgment of the period of incarceration. The Authority does not fix that period pursuant to a formula of punishment, but in accordance with the adjustment and social rehabilitation of the individual analyzed as a human composite of intellectual, emotional and genetic factors.

*People v. Morse*, 60 Cal. 2d 631, 642-43 (Cal. 1964). As this Court has recounted, California dramatically changed its law with passage of the DSL to limit discretion in determining the length of a prison term:

> Enacted in 1977, the DSL replaced an indeterminate sentencing regime in force in California for some 60 years. [Citation.] Under the prior regime, courts imposed open-ended prison terms (often one year to life), and the parole board – the Adult Authority – determined the amount of time a felon would ultimately spend in prison. [Citation.] In contrast, the DSL fixed the terms of imprisonment for most offenses . . . . Through
>
> the DSL, California's lawmakers aimed to promote uniform and proportionate punishment.

*Cunningham v. California*, 549 U.S. 270, 276-77 (2007).

Section 3041 established the rule that "the Board . . . shall normally set a parole date" at the inmate's first parole consideration hearing, held a year before his eligibility for parole. Cal. Penal Code § 3041(a). It further instructed: "The release date shall be set in a manner that will provide uniform terms for offenses of similar gravity and magnitude in respect to their threat to the public. . . . The Board shall establish criteria for the setting of parole release dates." *Id.*

Section 3041(b) shaped the rule laid out in subsection (a) by requiring that parole be granted unless the release of the prisoner would threaten public safety: "[T]he panel or board shall set a release date unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for this individual, and that a parole date, therefore, cannot be fixed at this meeting." Cal. Penal Code § 3041(b).

The regulations that the Board has enacted pursuant to § 3041 establish that the public safety consideration for determining parole suitability, and hence entitlement to a parole date, is "whether the prisoner will pose an unreasonable risk of danger to society if released from prison." Cal. Code Regs., tit. 15, § 2281; *see also In re Rosenkrantz*, 29 Cal. 4th at 653-54 (describing regulatory scheme).

As Petitioners admit, the California Supreme Court further explicated California's law of parole, holding that the parole authority is empowered to deny parole only if "'some evidence' supports the conclusion that the inmate is unsuitable for parole because he or she currently is dangerous." *See* Petition at 3 (quoting *In re Lawrence*, 44 Cal. 4th 1181, 1202 (Cal. 2008)); *see also In re Shaputis*, 44 Cal. 4th 1241, 1254 (Cal. 2008) ("Because the paramount consideration for both the Board and the Governor under the governing statutes is whether the inmate currently

poses a threat to public safety, and because the inmate's due process interest in parole mandates a meaningful review of a denial-of-parole decision, the proper articulation of the standard of review is whether there exists 'some evidence' that an inmate poses a current threat to public safety."). Thus, it is only the "core statutory determination that petitioner remains a current threat to public safety" that permits deprivation of a prisoner's conditional right to parole under California law. *Shaputis*, 44 Cal. 4th at 1254.

The California statutory scheme provides, then, that the setting of a parole date early in the inmate's incarceration is the rule under § 3041, with deferral of a parole date the exception. *See, e.g., Dannenberg*, 34 Cal. 4th at 1087 (while the state legislature provided "that uniform release dates would be a typical or common result for indetermine life inmates . . . , the Legislature provided an express 'public safety' exception"); *In re Scott*, 15 Cal. Rptr. 3d 32, 45 (Cal. Ct. App. 2004) ("parole is the rule, rather than the exception") (quoting *In re Smith*, 7 Cal. Rptr. 3d 655, 673 (Cal. Ct. App. 2003) (internal punctuation omitted)). The parole authority's power to deny parole based on current dangerousness is further constrained by the statutory aim to provide for uniform and predictable punishment for most life prisoners, set early in their terms: "[T]he Board's authority to make an exception to the requirement of setting a parole date based on the gravity of a life term inmate's current or past offenses should not operate so as to swallow the rule that parole is 'normally' to be granted." *In re Lawrence*, 44 Cal. 4th at 1211 (internal punctuation omitted).[4]

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[4] In addition, "the Board must apply detailed standards when evaluating whether an individual inmate is unsuitable for parole on public safety grounds." *Dannenberg*, 34 Cal. 4th at 1095 n.16; *accord*, *Rosenkrantz*, 29 Cal. 4th at 677 (the decision must "reflect[] due consideration of the specified factors as applied to the individual prisoner in

accordance with applicable legal standards").

In sum, the parole authority must set a parole date unless it determines that the prisoner's parole would pose an unreasonable danger to public safety and hence render him presently unsuitable for parole. *Rosenkrantz*, 29 Cal. 4th at 654 (citing Cal. Penal Code § 3041(a), Cal. Code Regs., tit. 15, §§ 2401-2402). "Accordingly, parole applicants . . . have an expectation that they will be granted parole unless the Board finds, in the exercise of its discretion, . . . that they are unsuitable for parole in light of the circumstances specified by statute and by regulation." *Id.* As the California Supreme Court has ruled, that expectation "give[s] rise to a protected liberty interest under the California Constitution." *Id.* at 660; *see also Dannenberg*, 34 Cal. 4th at 1094 (California's parole law gives life prisoners a "constitutionally protected expectation of parole").

**REASONS THE PETITION SHOULD BE DENIED**

Contrary to the State's repeated assertions, the Ninth Circuit did not grant habeas corpus based on violations of state law. The Court of Appeals below understood, as this Court recently reaffirmed, that in order to grant a writ of habeas corpus, it must find that the State violated the Constitution or other federal law. *See Wilson v. Corcoran*, No. 10-91 (U.S. Nov. 8, 2010) (per curiam).

First, the Ninth Circuit held (in a holding not disputed by Petitioners) that California law creates a liberty interest in prison time shortened by parole that is protected by the Due Process Clause. The court of appeals looked to state law in making this determination, but only to the extent required to apply constitutional rules clearly established by this Court. *See, e.g.*, *Wilkinson v. Austin*, 545 U.S. 209 (2005); *Sandin v. Conner*, 515 U.S. 472 (1995); *Bd. of Pardons v. Allen*, 482 U.S. 369 (1987); *Greenholtz v. Nebraska Inmates of Neb. Penal and Corr. Complex*, 442 U.S. 1 (1979).

And second, the court of appeals held that a State violates the Due Process Clause when it deprives an individual of a liberty interest based on a finding that is not supported by "some evidence." *See, e.g., Superintendent v. Hill*, 472 U.S. 445 (1985); *Douglas v. Buder*, 412 U.S. 430 (1973) (per curiam).

Those are the *federal* bases on which the court of appeals resolved this cases below (and subsequent cases). *Cooke v. Solis*, 606 F.3d 1206, 1213 (9th Cir. 2010); *Clay v. Kane*, Case No. 07-55377, __ Fed. Appx. __, Slip Op. at 3 (9th Cir. June 18, 2010) (citing *Hayward v. Marshall*, 603 F.3d 546, 562-63 (9th Cir. 2010) (en banc)); *see also Pearson v. Muntz*, Case No. 08-55728, __ F.3d __, Slip Op. at 17610, 17613-14 (9th Cir. Oct. 26, 2010) (stating that "the only possible basis for *Hayward*'s requirement that federal courts review California's application of the 'some evidence' rule is that the state requirement is mandated by *federal* law, specifically the Due Process Clause," and denying rehearing en banc) (emphasis added). These decisions do not warrant further review. Moreover, the defining characteristics of California's parole statute, virtually unique among those of the fifty States, makes the question presented by Petitioners one of extremely limited application.

## I. THE NINTH CIRCUIT DECISIONS CORRECTLY APPLIED CLEARLY ESTABLISHED LAW AND DO NOT VIOLATE ANY PRINCIPLES OF FEDERALISM OR COMITY.

### A. California Law Gives Indeterminate Life Prisoners a Liberty Interest in a Parole Date That Is Protected by Due Process.

The State asserts that "it is questionable whether a California life prisoner has a constitutionally protected entitlement in parole release." Petition at 16. The State, however, has not asked this Court to review that question. And that is because it is clear beyond dispute that a

State that creates a right to early release through mandatory parole has created a liberty interest that it protected by the federal Due Process Clause

This Court has expressly so held in two cases. In *Allen* and again in *Greenholtz*, the Court held that a State creates a constitutionally-protected interest in parole when it mandates parole upon the showing of a specified substantive predicate or permits denial of parole only upon a showing of a specified substantive predicate. *See Allen*, 482 U.S. at 378 n.10 ("shall/unless" language of Montana parole statute creates a liberty interest even under the "most restrictive interpretation" of *Greenholtz*). The Ninth Circuit, in its opinions below, applied this Court's precedent in *Allen* and *Greenholtz*. *Cooke*, 606 F.3d at 1213; *see also Clay*, __ Fed. Appx. __, Slip Op. at 3; *Pearson v. Muntz*, __ F.3d __, Slip Op. at 17610.

California's governing statute provides the parole authority "shall set a release date unless" a particular finding is met. Cal. Penal Code § 3041(b). As definitively interpreted by the California Supreme Court, state law provides that the parole authority *must* grant parole unless it determines that the prisoner "currently is dangerous." *In re Lawrence*, 44 Cal. 4th at 1204. The Ninth Circuit, in its opinions below, relied on the state court's interpretation of state law in determining the existence and scope of the liberty interest. *Cooke*, 606 F.3d at 1213-14 (citing *Lawrence*); *Clay*, __ Fed. Appx. __, Slip Op. at 2 (same).

As the State admits, "This Court in *Greenholtz*, 442 U.S. at 12, treated the question [whether the State created a liberty interest in parole protected by due process] as one of a negative inference drawn from state statutes and regulations where they compel a certain outcome based upon a certain factual showing." Petition at 16. As set forth above, California's statutes and regulations "compel a certain outcome" – the setting of a parole date – "upon a certain factual showing" – that the prisoner is not currently dangerous such that his release

would pose an unreasonable risk to public safety. Accordingly, it follows that California gives its prisoners sentenced to indeterminate life terms a liberty interest in a parole date that is protected by the federal Due Process Clause.

Nevertheless, the State submits that this Court's decision in *Sandin* v. *Conner*, *supra*, makes "uncertain" the criteria for determining whether a prisoner's interest in parole is protected by due process. Petition at 16. *Sandin*, however, did no more than address the concern that *outside the context of custody determinations*, the Court's rule regarding determining a liberty interest had become too rigid.

*Sandin* itself involved restrictions imposed on prisoners incident to daily management of the prison, deprivations of liberty whose insignificance the Court contrasted with "interests of 'real substance'" such as ones that affected the duration of imprisonment. *Id.* at 480 (quoting *Wolff* v. *McDonnell*, 418 U.S. 539 (1974)).

In *Sandin*, the Court traced the way in which its due process analysis for prison conditions had veered after *Wolff* from "looking to whether the State created an interest of 'real substance' comparable to the good time scheme of *Wolff*" to "whether the State had used 'language of an unmistakably mandatory character' such that the incursion on liberty would not occur 'absent specified substantive predicates.'" *Sandin*, 515 U.S. at 480 (quoting *Hewitt v. Helms*, 459 U.S. 460, 471-72 (1983)). This shift away from "the nature of the interest" and "the nature of the deprivation" to "the language of the regulation," the Court explained, had produced "undesirable effects," including "involvement of the courts in the day-to-day management of prisons" and "the fine-tuning of the ordinary incidents of prison life." *Id.* at 482. The Court in *Sandin* thus proclaimed

> The time has come to return to the due process principles we believe were correctly established and applied in *Wolff* and *Meachum* [*v. Fano*, 427 U.S. 215 (1976)].[5] Following *Wolff*, we recognize that States may under certain circumstances create liberty interests which are protected by the Due Process Clause

*Id.* at 483 (citing *Bd. of Pardons v. Allen*, *supra*).

*Allen*, of course, is one of the cases in which this Court found that the State created a

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[5] *Meachum v. Fano* was a case that "did not entail a loss of good time credits" or any other change in the duration of imprisonment, but rather a transfer between prisons. *Sandin*, 515 U.S. at 478. The Court found that arbitrary transfer to another prison did not implicate the Due Process Clause even if it constituted a grievous loss because state law placed no substantive predicates or limitations on the discretion of prison officials to transfer a prisoner; rather, they could "transfer him for whatever reason or for no reason at all." *Meachum v. Fano*, 427 U.S. at 228.

liberty interest in parole protected by due process. *Sandin*'s invocation of *Allen* in calling for a return to the first principles of *Wolff*, which found a protected liberty interest in a shortened prison sentence, thus reinforces the finding of a federally protected liberty interest in parole here, where the State has established a similarly qualified right to a shortened sentence.

Indeed, after *Sandin*, Justice Scalia could explain, without contradiction, that the Court has "recognized the existence of a due process liberty interest when a State's statutory parole procedures prescribe that a prisoner 'shall' be paroled if certain conditions are satisfied." *INS v. St. Cyr*, 533 U.S. 289, 345-46 (2001) (Scalia, J., dissenting) (citing *Allen*, 482 U.S. at 370-71; *Greenholtz*, 442 U.S. at 12).

**B. This Court's Cases Clearly Establish That Due Process Requires "Some Evidence" to Support a Deprivation of a Liberty Interest, and *Greenholtz* Is Not to the Contrary.**

Once a liberty interest has been established, one question becomes what process is due. But regardless of the process, the ultimate result reached must be rational and not arbitrary. Here, the Ninth Circuit held, following this Court's clearly established law, that due process requires that a State not deprive an individual of a liberty interest if "some evidence" does not exist to support the State's determination.

The Ninth Circuit did not adopt the "some evidence" standard from California law. *See Pearson*, __ F.3d __, Slip Op. at 17610 (explaining that requirement of "some evidence" is "mandated by federal law, specifically the Due Process Clause"). It is true that the California courts, as a matter of California law, also use a "some evidence" standard to review the parole decision. But the *federal* requirement of "some evidence" has long stood as the federal constitutional floor that must be present to meet the due process concern that governmental

action depriving an individual of a protected liberty interest be fundamentally fair in substance.

This clearly established rule of law is reflected in the Court's decision in *Hill*, 472 U.S. at 447, which "conclude[d] that where good time credits constitute a protected liberty interest, a decision to revoke such credits must be supported by some evidence." The Court came to this conclusion even though the State had provided all the protections that *Wolff* had prescribed for ensuring a reliable determination of misconduct that authorized the taking of the inmate's good time. The Court in *Hill* held that even where the State had provided all the hearing-related procedures that *Wolff* required, it violated the Due Process Clause for a State to deprive the prisoner of his right to those credits unless its finding of misconduct in fact was supported by some evidence. As the Court stated, the "some evidence" floor assures that "the record is not so devoid of evidence that the findings of the disciplinary board were without support or otherwise arbitrary." *Hill*, 472 U.S. at 457.

This Court has not limited the "some evidence" standard to the specific circumstance in *Hill*. As the Court has noted, it has "utilized the 'some evidence' standard in the past as a standard of review, . . . employed by courts in examining an administrative record developed after an adversarial proceeding" that has complied with the demands of procedural due process. *Hamdi v. Rumsfeld*, 542 U.S. 507, 537 (2004).

Nearly a century ago, the Court held: "A finding without evidence is arbitrary and baseless. . . . Such authority . . . is inconsistent with rational justice, and comes under the Constitution's condemnation of all arbitrary exercises of power." *ICC v. Louisville & Nashville R.R.*, 227 U.S. 88, 91 (1913); *see also Jackson v. Virginia*, 443 U.S. 307, 314 (1979) (the requirement of some evidence "secures the most elemental of due process rights: freedom from a wholly arbitrary deprivation of liberty"). The need for at least some evidence thus is inherent

in the finding of any protected liberty interest, it is only where a prisoner has no interest in liberty protected by due process that the State may take action against him without any supporting evidence—that is, "for whatever reason or for no reason at all." *Meachum v. Fano*, 427 U.S. at 228 (transfer of inmate to different prison does not infringe on a liberty interest protected by due process).

This Court's jurisprudence over the last century has established that, at the very least, some evidence must support any action depriving an individual of a substantial liberty interest protected by due process:

> In a variety of contexts, the Court has recognized that a governmental decision resulting in the loss of an important liberty interest violates due process if the decision is not supported by any evidence. *See, e.g., Douglas v. Buder*, 412 U.S. 430, 432 (1973) (per curiam) (revocation of probation); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957) (denial of admission to bar); *United States ex rel. Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 106 (1927) (deportation).

*Hill*, 472 U.S. at 455; *see also Dickenson v. United States*, 346 U.S. 389 (1953) (requiring some "basis in fact" as a matter of due process to support Selective Service classifications); *see generally* Neuman, *The Constitutional Requirement of "Some Evidence,"* 25 San Diego L. Rev. 631, 688 (1988) (chronicling since 1912 "the Court's continuing perception of a need to scrutinize decisions for 'some evidence' that supports them" when they deprive an individual of a protected liberty interest).

The State argues that "*Greenholtz* established the contours of any constitutional process 'due' in a case such as this one," where the prisoner's liberty interest in parole is protected by due process. Petition at 12. In such cases, the State argues, this Court required "an opportunity to be heard and a statement of reasons why parole was denied" and "specifically recognized that 'the Constitution does not require more.'" Petition at 18 (quoting *Greenholtz*, 442 U.S. at 16). Because California "provides the *Greenholtz* protections, and more"—including subjecting parole deprivations "to state judicial review of some evidence"—the State argues, "[s]urely these are sufficient protections to ensure basic reliability of the process." Petition at 18.

But *Greenholtz* arose under 42 U.S.C. § 1983 as an effort to make sure that the overall scheme for making parole decisions comported with procedural due process. It was not a challenge by an individual prisoner, on habeas review, that the denial of his parole was unconstitutional. *Greenholtz* thus had no reason to address this issue. Indeed, the requirement of some evidence assumes that the parole authority will already have conducted a hearing that complied with the procedural requirements of due process. Thus, the State is simply wrong in its contention that "[t]he Ninth Circuit's notion in *Cooke* and *Clay* that federal due process requires review of a state parole decision of 'some evidence' is contrary to this Court's holding in *Greenholtz*." Petition at 18.

## II. THE NINTH CIRCUIT DECISIONS AFFORDED THE STATE COURT ADJUDICATIONS THE DEFERENCE REQUIRED BY 28 U.S.C. § 2254.

Petitioners assume arguendo "that the state court decisions . . . were 'incorrect' or 'unreasonable' in finding 'some evidence' to support the denial of parole." Petition at 20.[6]

[6] Thus, the State's claim that the habeas relief granted by the Ninth

Petitioners nevertheless assert that the Ninth Circuit decisions "erred under § 2254 in granting relief" because Cooke's and Clay's constitutional claim that such a substantively arbitrary deprivation of their liberty interest in parole violated due process "was a novel one of a type never before endorsed by this Court as applicable to the question of parole suitability." Petition at 20. That assertion fails.

As noted above in Part I.B, the jurisprudence of this Court has clearly established that due process requires, at a minimum, some evidence to support deprivation of an inmate's protected liberty interest. That these cases arise in contexts other than parole is irrelevant. The "important liberty interest in *Hill*" concerned the shortened prison sentence achieved by good time, *i.e.*, "[the inmate's] prospective freedom from confinement." *Hill*, 472 U.S. at 454. It breaks no ground to apply the due process requirement of some evidence to a California life prisoner's more dramatically shortened sentence and prospective freedom from confinement represented by a grant of a parole date. In *Hill*, Massachusetts law provided that the State could deprive the prisoner of his liberty interest in his prospective freedom only if there was some evidence of his misconduct. Here, California law provides that the State may deprive the prisoner of his liberty interest in his prospective freedom only if there is some evidence of his current dangerousness.

## III. THE QUESTION PRESENTED DOES NOT HAVE BROAD APPLICATION, GIVEN THE PECULIARITIES OF CALIFORNIA'S PAROLE LAW.

Further review is not warranted because this case is of no importance outside of

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Circuit was "based on its own view of a state prisoner's suitability for parole," Petition at 20, is irrelevant. It also has no support in the record.

California. As the Petition states: "'Our system of federalism encourages state experimentation' in developing methods of determining parole suitability." *Id.* at 12 (quoting *Greenholtz*, 442 U.S. at 13) (internal punctuation omitted)). The Ninth Circuit has recognized California's experiment in providing a parole law that balances concerns of public safety with uniformity and proportionality of punishment, and has been careful to require of the State no more than the State has prescribed for itself.

California is virtually the only jurisdiction in the country to provide a definitive right to parole and to place delineated limits on the power of the parole authority to deny parole. Indeed, the parole statute of only one other State, New Jersey, even approaches that of California. N.J. Stat. Ann. 30:4-123.53 (providing that "[a]n adult inmate shall be released on parole at the time of parole eligibility, unless [the parole board finds] . . . by a preponderance of the evidence that there is a substantial likelihood that the inmate will commit a crime under the laws of this State if released"). Of the remaining States, precious few give a prisoner any right to parole under any circumstances.[7]

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[7] The overwhelming majority of States fall into this category. *See, e.g.*, *Thompson v. Bd. of Pardons & Paroles*, 806 So.2d 374, 375 (Ala. 2001) (Alabama parole statute confers no right to parole); Alaska Stat. §§ 33.16.090, 33.16.100 (inmate "may, in the discretion of the board," be released on parole); Ark. Code Ann. § 16-93-701 (parole board "may" decide to release inmate on parole); Colo. Rev. Stat. Ann. § 17-2-201(4)(a) (same); Conn. Gen. Stat. § 54-125a (same); Del. Code Ann. tit. 11, § 4347(c) (same); D.C. Code § 24-404(a) (same); Haw. Rev. Stat. § 353-68 (same); Idaho Code Ann. § 20-223 (same); 730 Ill. Comp. Stat. 5/3-3-5 (setting conditions under which parole shall not be granted but setting no conditions under which it shall be granted); Ind. Code §§ 11-13-3-2, 3 (right to parole hearing but no right to parole release); Kan. Stat. Ann. § 22-

3717(g) (parole board "may" release inmate on parole); Ky. Rev. Stat. Ann. § 439.340 (same); La. Rev. Stat. Ann. § 15:574.4 (requiring only that parole board "consider" various classes of information); Mass. Gen. Laws ch. 127 § 33 (providing that parole board "may" grant parole); Me. Rev. Stat. tit. 34-A, § 5211 (providing that parole board "may grant or deny parole"); Md. Code Ann., Corr. Servs. § 4-305 (providing that parole board "may" grant parole); Minn. Stat. § 609.12 (same); *Morales v. Mich. Parole Bd.*, 676 N.W.2d 221, 235 (Mich. 2003) (holding that Michigan parole statute, Mich. Comp. Laws § 791.233, confers no right to parole); Miss. Code Ann. § 47-7-3 (providing that parole board "may" grant parole); Mo. Rev. Stat. § 217.690 (same); Mont. Code Ann. § 46-23-201 (same); Nev. Rev. Stat. § 213.1099 (providing that parole board "may" release inmate on parole); N.H. Rev. Stat. Ann. § 651-A:6 (providing that parole board "may" release on parole inmates not convicted of non-violent crimes); N.M. Stat. § 31-21-10 (determinate parole scheme accompanying determinate sentencing scheme except for inmates serving indeterminate life sentences, who are "eligible" for "parole hearing" after serving specified portion of sentence); N.Y. Exec. Law § 259-i(c) (parole board has discretion to order release); N.C. Gen. Stat. § 15A-1371 (parole board "may" refuse to release inmate); N.D. Sent. Cent. § 12-59-07 (parole board "may" grant parole); Ohio Admin. Code Ann. 5120:1-1-07 (parole board "may" release inmate who has served specified portion of sentence); Okla. Stat. tit. 57, § 332.7 (parole board "may" determine a parole date); 61 Pa. Cons. Stat. § 6137 (parole board "may" parole inmate); S.C. Code Ann. § 24-21-645 (same); S.D. Codified Laws § 24-15-8 (same); Tenn. Code Ann. § 40-28-117 (same); Tex. Govt. Code Ann. § 508.141 (same); Utah Code Ann. § 77-27-5 (setting out classes of information for parole board to consider and explicitly providing that parole decisions are not subject to judicial review); Va. Code Ann. § 53-1-154.1 (providing that parole board "may" release inmate); Wash. Rev. Code §§ 9.94A.728, 9.94A.729 (providing that inmate may be released before expiration of sentence if he earns early release time, which is not an entitlement); Wis. Stat. § 304.06 (board "may" release inmate on parole); Wyo. Stat. Ann. § 7.13-402 (same).

The few States that do provide a right to parole under certain circumstances define those circumstances in such terms that release on parole is left largely unrestricted as to length of term and release, in distinct contrast to the detailed regulations that govern the length of the term in California and the right to parole absent the single circumstance that permits denial of a parole date. For example, the parole law in the two jurisdictions in which this Court found that the state mandated parole under certain circumstances, Montana and Nebraska, listed those circumstances in such general, nebulous terms that the substantive power of the authority to deny parole was largely unrestrained. *Allen*, *supra* (construing former version of present, permissively-worded parole statute, Mont. Code Ann. § 46-23-201); *Greenholtz*, *supra* (construing Nebraska statute).[8]

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[8] Other States have similarly general and vague standards for parole. *See, e.g., Cooper v. Az. Bd. of Pardons*, 717 P.2d 861, 864 (Ariz. 1986) (Arizona parole statute, Ariz. Rev. Stat. Ann. § 31-412, "hardly curtails the Board's discretion at all"); *Sultenfuss v. Snow*, 35 F.3d 1494 (11th Cir. 1994) (finding Georgia parole statute, Ga. Code Ann. § 42-9-42(c), to do no more than require parole board to consider certain criteria in exercising its discretion); *see also* Fla. Stat. § 947.18 (parole statute of nearly identical wording to Georgia statute); Iowa Code § 906.4 (providing for release if parole board is of "opinion" that "there is reasonable probability that the person can be released without detriment to the community or to the person," and further providing that "[a] person's release is not a detriment to the community or the person if the person is able and willing to fulfill the obligations of a law-abiding citizen, in the board's determination"); Or. Rev. Stat. § 144.120(a), (b) (making parole release contingent on the inmate's satisfaction of the many requirements set out in Or. Rev. Stat. § 144.125 and even then permitting variance from the set range of the sentence to be served); R.I. Gen. Laws § 13-8-14.1 (providing for release after the parole board has considered its own parole standards, from which it may vary if variance "is warranted by individualized factors, such as the character and criminal record of the applicant, the nature and circumstances of the offense or offenses," and other, similar factors); Vt. Stat. Ann. tit. 28 §

502a(b) (providing for parole release if the inmate is eligible for parole, if a reasonable probability exists that he can be released without detriment to himself or to the community, and if he is willing and able to fulfill the obligations of a law-abiding citizen); W.Va. Code Ann. § 62-12-13(a), (b) (providing for parole release if parole board is "of the opinion" that release will serve "the best interests of the state and of the inmate" and if the inmate is eligible, and providing for eligibility only if the inmate has served a certain proportion of his term or has met five other set requirements and has additionally maintained a good institutional record, has submitted a written parole release plan, and has satisfied a number of other requirements).

Because of the uniqueness of California's parole law, any decision on grant of certiorari would have little if any practical effect on any other jurisdiction.

* * * * * *

## CONCLUSION

For these reasons, the Court should deny the petition for writ of certiorari.

Dated: November 12, 2010

Respectfully submitted,

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# REPLY BRIEF

Supreme Court, U.S.
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No. 10-333

# In the Supreme Court of the United States

GARY SWARTHOUT, *Petitioner*,

v.

DAMON COOKE, *Respondent*.

MATTHEW CATE, *Petitioner*,

v.

ELIJAH CLAY, *Respondent*.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## REPLY TO BRIEF IN OPPOSITION

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## REPLY BRIEF

As this Court ruled in just the last two weeks, federal courts may not issue writs of habeas corpus to state prisoners whose confinement does not violate federal law. *Wilson* v. *Corcoran*, No. 10-91 (Nov. 8, 2010) (per curiam). Yet in respondent Cooke's and Clay's cases—as well as in numerous other cases within the courts of the Ninth Circuit—this is exactly what has occurred.[1] In second-guessing the state court's application of its own state-law standard for justifying denial of parole to state prisoners, the Ninth Circuit has untenably intruded on the State's administration of its parole system and has transgressed basic limits on its habeas corpus power.

As seven judges of the Ninth Circuit recently explained, the Ninth Circuit's approach to evaluating habeas corpus challenges to state parole decisions is "completely at odds with AEDPA's plain language." *Pearson* v. *Muntz*, ___ F.3d ___, 2010 WL 4227461, *1 (9th Cir. Oct. 26, 2010) (Ikuta, J., dissenting from denial of rehearing en banc).[2] Without this Court's

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[1] See e.g., *Pirtle* v. *Cal. Bd. of Prison Terms*, 611 F.3d 1015 (9th Cir. 2010); *Johnson* v. *Finn*, No. 06-17042, 2010 WL 3469369 (9th Cir. Sept. 3, 2010); *Sneed* v. *Kane*, No. 07-15061, 2010 WL 3002132 (9th Cir. Aug. 2, 2010); *Slater* v. *Sullivan*, No. 09-17784, 2010 WL 4117080 (9th Cir. Oct. 20, 2010); *Miranda* v. *Carey*, ___ F. Supp. 2d ___, 2010 WL 4010374 (E.D. Cal. Oct. 13, 2010); *Holder* v. *Curry*, ___ F. Supp. 2d ___, 2010 WL 3076822 (N.D. Cal. Aug. 6, 2010). According to petitioners' count, since the certiorari petition was filed on September 2, 2010, federal courts in California have invalidated thirty-two parole decisions that the state court had approved. Thus, since April 2010 when the Ninth Circuit issued the en banc decision in *Hayward* v. *Marshall*, 603 F.3d 546, 559 (9th Cir. 2010) (en banc), the federal courts have invalidated fifty-eight such decisions.

[2] The State has sought en banc review in several (continued...)

intervention, as those judges recognized, the Ninth Circuit's analytic approach "will consistently generate wrong decisions in the hundreds of challenges to California parole decisions adjudicated by federal courts in [the Ninth Circuit] each year." *Id.*

1. Respondents, indeed, have not tried to justify the Ninth Circuit's holding that California's some-evidence standard of judicial review for parole decisions is a component of a "liberty interest" created by the State. Pet. 14, App. 18a. There is simply no precedent for the proposition that an individual has such an interest in a state-created procedural rule. Indeed, this Court has held to the contrary. *Olim* v. *Wakinekona*, 461 U.S. 238, 250-51 (1983).

Instead, respondents Cooke and Clay rely, as did the Ninth Circuit, on the "mandatory-language" methodology announced in *Greenholtz* v. *Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1 (1979), for establishing whether a state has created a liberty interest. They argue that "it is clear beyond dispute that a State that creates a right to early release through mandatory parole has created a liberty interest that it [sic] protected by the federal Due Process Clause." Opp. 12 (citing *Cooke* v. *Solis*, 606 F.3d 1206, 1213 (9th Cir. 2010), *Clay* v. *Kane*, 07-55377, ___ Fed. Appx. ___, Slip Op. at 3 (9th Cir.

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(...continued)
AEDPA habeas corpus cases challenging parole decisions. The Ninth Circuit, however, has declined to grant a hearing in each case. See *Pearson*, 2010 WL 4227461 at *1; *Pirtle*, 611 F.3d 1015 (reh'g denied Oct. 20, 2010); *Johnson*, 2010 WL 3469369 (reh'g denied Oct. 20, 2010); *Sneed*, 2010 WL 3002132 (reh'g denied Nov. 12, 2010).

June 18, 2010), and *Pearson* v. *Muntz*, ___ F.3d ___, Slip Op. at 17610 (9th Cir. Oct. 26, 2010)).

The criteria for ascertaining whether a state-created liberty interest exists, however, are uncertain. Pet. 16; *Sandin* v. *Connor*, 515 U.S. 472 (1995); *Wilkinson* v. *Austin*, 545 U.S. 209, 229 (2005). And, as noted, not even respondents defend the Ninth Circuit's crucial holding that California has created a "liberty interest" in a judicial standard of sufficiency-of-evidence review, regardless of what criteria are employed.

2. Anyway, even if California inmates have a constitutionally protected liberty interest in parole, the question would remain: what *federal* process is due to protect that interest? *Ky. Dep't of Corr.* v. *Thompson*, 490 U.S. 454, 460 (1989). And this Court has held that due process is satisfied where the inmate has "an opportunity to be heard" and is "inform[ed] . . . in what respects he [fell] short of qualifying for parole." *Greenholtz*, 442 U.S. at 16. Especially under the AEDPA deferential review standard provided in 28 U.S.C. § 2254(d), that should end the inquiry. No holding of this Court "clearly establishes" that federal habeas corpus courts may second-guess state parole-denial decisions or evaluate them for evidentiary sufficiency.

Respondents' argument to the contrary – that this Court's cases clearly establish that due process requires "some evidence" to support a parole denial, Opp. 16-21 – is unavailing. Respondents assert that "the federal requirement of 'some evidence' has long stood as the federal constitutional floor that must be present to meet the due process concern that governmental action is depriving an individual of a protected liberty interest . . . ." Opp. 17. But while this Court has held in some contexts that a

governmental decision must be supported by some evidence, it has never so held in the parole context. As this Court has made clear, a test announced as governing in one context does not "clearly establish" under § 2254(d) that it applies in a different context. *Knowles* v. *Mirzayance*, ___ U.S. ___, 129 S. Ct. 1411 (2009); *Wright* v. *Van Patten*, 552 U.S. 120, 125-26 (2008); *Schriro* v. *Landrigan*, 550 U.S. 465 (2007); *Carey* v. *Musladin*, 549 U.S. 70, 76-77 (2006).

The parole context makes all the difference here. *Greenholtz* itself emphasized that parole is a discretionary and predictive decision that cannot always be articulated in traditional fact findings. *Greenholtz*, 442 U.S. at 15-16.

By way of contrast, the cases relied on by respondents involve situations that are neither subjective nor predictive. Opp. 18-19. There, the some-evidence standard of review was applied to evaluate an adjudication of retrospective historical facts. Although respondents do not seem to recognize this difference, the Ninth Circuit itself has recognized it. *Hayward*, 603 F.3d at 559 ("The relevant Supreme Court decisions require 'some evidence' for denial of good time, but do not require it for denial of parole, and they carefully distinguish good time from parole."). Still, respondents reassert that it breaks no ground to apply the "some evidence" test established in *Superintendent* v. *Hill*, 472 U.S. 445 (1985) to parole. Opp. 19. But the relevant inquiry is whether this Court has announced that *Hill*'s some-evidence test applies to parole. If, as here, the answer is "no," then relief under AEDPA is not available based on an analysis of respondents' claims under *Hill*.

3. Despite the Ninth Circuit's recognition that there is no independent federal "some evidence"

requirement for state parole, and that the some-evidence test employed in the prison disciplinary context is not applicable to the parole context, respondents inexplicably contend that the Ninth Circuit did not purport to enforce California's "some-evidence" standard instead. Opp. 17. To the contrary, the Ninth Circuit held that federal habeas courts may review, under 28 U.S.C. § 2254, "whether the California judicial decision approving the [parole authority's] decision rejecting parole was an 'unreasonable application' of the *California 'some evidence' requirement*, or was 'based on an unreasonable determination of the facts in light of the evidence.'" *Hayward*, 603 F.3d at 563 (emphasis added). Indeed, seven judges of the Ninth Circuit recently acknowledged that the Ninth Circuit has embarked on enforcement of California's state-law some-evidence test. They have explained that, contrary to the plain language of § 2254(d), the Ninth Circuit has held "that a California prisoner is entitled to habeas relief because the state court's decision was inconsistent with *California law* as determined by the *California Supreme Court*, or was based on an unreasonable factual determination of a *state law* issue." *Pearson*, 2010 WL 4227461 at *1 (Ikuta, J., dissenting from denial of rehearing en banc) (citing *Pearson* v. *Muntz*, 606 F.3d 606, 611-12 (9th Cir. 2010) (per curiam)). In doing so, the Ninth Circuit has in effect rewritten § 2254(d). *Pearson*, 2010 WL 4227461 at *1, *4 (Ikuta, J., dissenting from denial of rehearing en banc). While the statutory language asks whether the state court's decision was "an unreasonable application of, *clearly established Federal law, as determined by the Supreme Court of the United States*," the Ninth Circuit asks whether the state court's decision "was an unreasonable

application of *the California some evidence requirement*." Compare 28 U.S.C. § 2254(d)(1) (emphasis added) with *Hayward*, 603 F.3d at 563 (emphasis added).

And this is precisely the analytical framework erroneously employed in respondents' cases. In respondent Cooke's case, the panel framed the issue as "whether the decision of the Alameda County Superior Court was an unreasonable application of *California's* 'some evidence' requirement . . . ." App. 18a (emphasis added). Likewise, in respondent Clay's case the panel held that "the Los Angeles Superior Court's decision . . . was an unreasonable application of *California's* 'some evidence' rule and was an unreasonable determination of the facts in light of the evidence presented." App. 67a (emphasis added). The Ninth Circuit thus persists in the same error this Court condemned in *Wilson* v. *Corcoran*.

4. In passing and without explanation, respondents contend that "the State's claim that the habeas relief granted by the Ninth Circuit was 'based on its own view of a state prisoner's suitability for parole,' . . . is irrelevant." Opp. 21. But it is especially untenable and intrusive for federal courts to second-guess such decisions. And, indeed, the court of appeals independently evaluated Cooke's and Clay's parole suitability within the framework of California law. Pet. 6-7, 9-10. This Court has never authorized such federal review of the substance of a state parole decision. Following *Hayward*, *Pearson*, and *Cooke*, however, the federal courts are reviewing the decisions of state courts interpreting and applying state law—in effect serving as super-appellate courts over state-court decisions.

5. Respondents argue that review by this Court is not warranted because, they say, a decision

regarding California's unique parole law will have no practical effect on any other jurisdiction. Opp. 22-26. As indicated in the certiorari petition, even if the effect were limited to California, the number of individuals and cases impacted by the Ninth Circuit's decisions is great. Pet. 11 (since 2008 over 1,500 district court petitions involving sufficiency-of-evidence challenges to California parole decisions and roughly 400 similar appeals in the Ninth Circuit have been filed); see also *Pearson*, 2010 WL 4227461 at *1 (Ikuta, J., dissenting from denial of rehearing en banc) (recognizing that there are hundreds of challenges to California parole decisions adjudicated by federal courts in the Ninth Circuit each year).

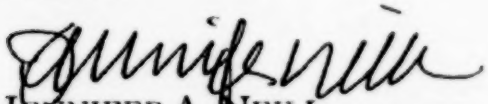
The fact that California law might guarantee inmate benefits beyond what other states provide should not serve as a license for the Ninth Circuit to grant habeas corpus relief based on state law. Nor should it deter this Court from continuing to ensure faithful enforcement, in the lower courts, of the limits Congress imposed on the scope of the writ in AEDPA.

## CONCLUSION

The consolidated petition for writ of certiorari should be granted.

Respectfully submitted,

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